Supreme Court, U.S.
FILED

021219 FEB 18 2003

OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

CECG, INC.,

Petitioner,

v.

MAGIC SOFTWARE ENTERPRISES, INC. and
MAGIC SOFTWARE ENTERPRISES, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELIAS L. SCHNEIDER
Counsel of Record
C/O BRIGIANI COHEN & SCHNEIDER, PA
Attorney for Petitioner
603 Cranbury Road
East Brunswick, NJ 08816
(732) 257-0700

179068

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

96 pp

QUESTIONS PRESENTED

1. Does the US Court of Appeals have original jurisdiction to make findings of facts as was done in the case at bar?

2. If the U.S. Court of Appeals has jurisdiction to make initial findings of fact, whether as a result of a *de novo* review of the record or otherwise, is plaintiff entitled to at least one level of appeal from that court on the claim that the finding of fact is clearly, blatantly or otherwise erroneous?

3. Did the action of the Court of Appeals deny plaintiff its Seventh Amendment right to a jury trial as well as its substantive state right to a jury trial?

4. Does the Federal Court obtain good jurisdiction when a party to state court litigation ignores a contract provision that limits jurisdiction over the controversy to the state courts, and proceeds to remove the matter to the federal court system?

5. Is a party denied substantive due process of law if the court decides the case on an issue that neither side raised, addressed nor was given any opportunity to respond to?

6. If the purchaser of a computer software program negotiates a modification of the shrink wrap license with the seller of the program, can the seller later remove a state court suit to the federal courts and avoid the provision in the contract that places exclusive jurisdiction for litigation in the state courts?

7. Does the Supreme Court's supervisory function over the U.S. Court of Appeals extend to cases where the claim is that (a) the Court of Appeals never had jurisdiction to start with, (b) that the court exceeded its jurisdiction by making initial findings of fact, (c) that the procedures invoked by the court violated plaintiff's state and federal substantive right to a jury trial, (d) that the court decided the case on an issue that was never substantially addressed by either party and the parties were effectively denied the opportunity to address the issue, and (d) that the Court of Appeals made a blatantly erroneous finding of fact?

STATEMENT PURSUANT TO RULE 29.6

Petitioner CECG, Inc states that is has no corporate parents, and that no publicly held company owns 10% or more of CECG, Inc.'s stock.

TABLE OF CONTENTS

Page

Questions Presented i

Statement Pursuant to Rule 29.6 iii

Table of Contents iv

Table of Cited Authorities vii

Table of Appendices viii

Opinions Below 1

Jurisdiction 2

Statement Of Subject Matter Jurisdiction 2

Statement Of Appellate Jurisdiction 3

Statutory Provisions Involved 3

Statement Of The Case 3

Reasons For Granting The Petition 20

Point 1

U.S. Circuit Court Of Appeals Does Not Have Original Jurisdiction To Make Findings Of Facts As Was Done In The Case At Bar. ... 20

Contents

Page

Point 2

If The U.S. Circuit Court Of Appeals Has Jurisdiction To Make Initial Findings Of Fact, Whether As A Result Of A *De Novo* Review Of The Record Or Otherwise, Plaintiff Is Entitled To At Least One Level Of Appeal From That Court On The Claim That The Finding Of Fact Is Clearly, Blatantly Or Otherwise Erroneous. 21

Point 3

The Action Of The Court Of Appeals Denied Plaintiff Its Seventh Amendment Right To A Jury Trial As Well As Its State Right To A Jury Trial. 21

Point 4

If A Purchaser Of A Computer Software Program Negotiates A Modification Of The Shrink Wrap License With The Seller Of The Program, The Seller Cannot Later Remove A State Court Suit To The Federal Courts And Avoid The Provision In The Contract That Places Exclusive Jurisdiction For Litigation In The State Courts. 22

Contents

Page

Point 5

For The Court Of Appeals To Decide The Case On A Ground That Was Not Argued Nor Briefed By Either Party, Nor Presented To The Parties By The Court For Argument, Is To Deny Plaintiff Substantive Due Process Of Law. 23

Point 6

The Contract Between The Parties Vested Exclusive Jurisdiction In The State Court System Of New Jersey, And The Federal Court System Should Not Have Sanctioned The Removal. 23

Point 7

Supreme Court's Supervisory Function Over The U.S. Court Of Appeals. 24

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

Cases:

Brown v. Texas, 433 U.S. 47 (1979) 21

Kugler v. Banner Pontiac-Buick, Opel, Inc., 120 N.J. Super. 572, 295 A.2d 385 (Ch. Div. 1972) 22

Procanik by Procanik v. Cillo, 226 N.J. Super. 132, 543 A.2d 985 (N.J. Super. A.D. 1988) 23

United States Constitution:

Seventh Amendment 3, 5, 21, 22

Statutes:

28 U.S.C. § 1291 ..... 3, 20

28 U.S.C. § 1295 ..... 3, 20

NJSA 12A:2-207 ..... 3, 5, 18, 19, 20

NJSA 12A:2-201 ..... 3, 8

NJSA 12A:2-202 9

Rule:

FRAP 3 3

Rule 13 Rules of the Supreme Court 3

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Dated And Filed October 8, 2002 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The District Of New Jersey Filed December 12, 2001 ..... 15a

Appendix C — Opinion And Order Of The United States District Court For The District Of New Jersey Filed February 16, 2001 ..... 41a

Appendix D — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Panel Rehearing Dated November 19, 2002 ..... 55a

Appendix E — Relevant Provisions Involved 57a

No. 02-

IN THE

Supreme Court of the United States

CECG, INC.,

Petitioner,

v.

MAGIC SOFTWARE ENTERPRISES, INC. and
MAGIC SOFTWARE ENTERPRISES, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CECG, INC., Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

This is a dispute involving a contract between (a) a computer software developer/owner known as Magic Software

Enterprises, Ltd. and its computer software distributor known as Magic Software Enterprises, Inc. and (b) CECG, Inc. the purchaser of the product. Suit was initially filed in the Superior Court of New Jersey, Law Division, Middlesex County on April 7, 2000, and removed by the respondents to the United States District Court for the District of New Jersey on May 10, 2000.

The opinions below are:

1. The U.S. District Court denied remand on February 16, 2001,

2. Upon completion of discovery denied a motion to reconsider the denial of remand, on December 11, 2001 and

3. The District Court granted Defendants' motion for Summary Judgment December 11, 2001,

4. The matter was appealed to the United States Court of Appeals for the Third Circuit which rendered an Opinion on October 8, 2002,

5. and denied rehearing/reconsideration November 19, 2002.

All decisions are unreported.

JURISDICTION

STATEMENT OF SUBJECT MATTER JURISDICTION

District Court: Plaintiff filed suit in the Superior Court of New Jersey, Middlesex County, which suit was removed by Defendants. Plaintiff insists that the District Court did not have jurisdiction as the contract between the parties required all disputes to be resolved in the Middlesex County Courts.

Plaintiff's application for remand was denied, as was the motion for reconsideration of the denial of remand once discovery was completed (which discovery revealed that crucial facts relied upon by the Judge in denying the initial motion for remand were proven erroneous).

STATEMENT OF APPELLATE JURISDICTION

Third Circuit Court of Appeals: Plaintiff appealed pursuant to FRAP 3, from the Final Judgment of the District Court dated December 12, 2001 and the denial of the motions for remand and reconsideration of the remand. The decision of the Third Circuit Court of Appeals is dated October 8, 2002. The Order denying the application for rehearing is dated November 19, 2002. This Petition for Certiorari is filed within the 90 days set forth in Rule 13, Rules of the Supreme Court of the United States.

Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1291 and 1295(a).

STATUTORY PROVISIONS INVOLVED

The provisions of 28 U.S.C. § 1291 "Final decisions of district courts" and of 28 U.S.C. § 1295(a) "Jurisdiction of the United States Court of Appeals for the Federal Circuit," and of the New Jersey Uniform Commercial Code, NJSA 12A:2-207 and NJSA 12A:2-201(3)(c), and the Seventh Amendment to the United States Constitution are reprinted in Petitioner's Appendix.

STATEMENT OF THE CASE

This case involves the Supervisory function of the U.S. Supreme Court over the U.S. Court of Appeals, and the denial of plaintiff's Seventh Amendment right to a jury trial as well plaintiff's substantive state right to a jury trial.

The Court of Appeals exercised questionable original jurisdiction by making a finding of fact not made by the court below, specifically that the contract between the parties did not contain a certain type of provision. The Appeals Court did not grant Plaintiff's request for oral argument and plaintiff was unaware and unable to respond to an issue that was not previously raised by the defendant nor the court below and therefore never briefed. That finding of fact was blatantly erroneous, and on application for reconsideration, the court of appeals refused to reconsider the matter. Either the contract- a single sheet, two-sided agreement- contains the provision that the court says is lacking, or it does not. Plaintiff believes that it is entitled to at least one level of appeal to correct a blatant error. If the disputed provision exists, then the parties agreed that any disputes were to be limited to the State Courts of New Jersey, and not to U.S. District Court which never had jurisdiction on day one (case had been removed by defendant from the Superior Court of New Jersey).

The wording of the documents was not disputed. The court stated the legal requirement that CECG could not make a material alteration to the contract

> "* * * unless CECG's purchase order indicated that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1)."

That statement of the law is followed on the top of Page 11 of the Opinion with the factual finding, "The purchase order did not so indicate."

The Purchase Order dated January 10, 2000 states on the first page "Please Enter Our Order for the Goods Described herein, Subject to the Terms and Provisions Set Forth on the Face and Reverse Side of this Purchase Order."

The "Terms of Purchase Order" commences with term number 1, entitled "Acceptance" and reads as follows:

> "1. Acceptance. Commencement of performance pursuant to this Purchase Order constitutes acceptance hereof by Seller. If specified delivery dates cannot be met, Seller shall notify Buyer promptly of Seller's best alternative. The terms of this Purchase Order may not be modified, superseded or amended except in a writing signed by an authorized representative of Buyer. **Each shipment received by Buyer shall only be upon the terms of this Purchase Order, notwithstanding any terms contained in any quotation, acknowledgment, license agreement, invoice or other form of Seller, or Buyer's acceptance of, or payment for, any shipment or any other act.**" [emphasis added]

The language emphasized above and as contained on the front of the Purchase Order does precisely what the law requires, i.e. it makes acceptance of the purchase order expressly conditional on the acceptance of the terms of the Purchase Order, i.e. it indicates that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1).

The actions of the motion judge at the District Court level, and the 3 judge panel at the Court of Appeals level, denied plaintiff its state substantive rights to a jury trial on the factual issues, as well as its Seventh Amendment right to a jury trial.

The actions of the Court of Appeals, in ruling on an issue that was never argued nor briefed by the parties, nor presented to the parties by the Court of Appeals, was also a denial of Plaintiff's basic and substantive right of due process.

Prior to any discovery in the case, Plaintiff made a motion to remand. Based on misrepresentations of fact made by the Defendant-Respondents, the motion judge denied the application to remand. After discovery was completed and the facts that the judge relied upon were proven erroneous, plaintiff moved for reconsideration of the motion to remand. That application was denied. The erroneous facts that the motion judge relied upon were that when the merchandise purchased by plaintiff was delivered, it was accompanied by a shrink wrap software license, presumably opened upon receipt and therefore accepted by plaintiff, that superseded the contract provisions of the Purchase Order and accompanying check previously submitted by plaintiff and accepted by the defendants.

Discovery revealed the following:

Plaintiff is a small software programmer who had previously purchased a software development engine called "Magic" and purchased a Royalty Free unlimited run time license from defendant. The development engine allowed Plaintiff to design software programs and the royalty free Unlimited Run Time License ("URTL") allowed Plaintiff to distribute the programs it designed without further charge or royalty by defendant. (See Opinion and Order). The "URTL" applied to programs developed by Plaintiff using the version of Magic development engine it purchased (version 2.5) and was extended without charge up to and including version 5 of the development engine, in 1990. (Opinion and Order).

Plaintiff originally chose to buy this product from among other similar products on the market because (1) it worked well, (2) allowed Plaintiff to distribute its software without royalties, and (3) was accompanied with the oral promise that each time Plaintiff purchased an updated version of the Magic Development Engine, that the URTL would apply to the new

version of Magic. (See Opinion and Order). Magic Software Enterprises still recognizes Plaintiff's "unlimited" URTL today through Version 5.02, and plaintiff was still using the Magic engine through 1999. (Opinion and Order). What Plaintiff's Purchase Order did was allow Plaintiff to use the newest version of the development engine and distribute the resulting software without royalty payment. The only difference between what Plaintiff could do before the purchase and after the purchase is that the new development engine (the "upgrade"- see Opinion and Order) allows Plaintiff to produce software with more bells and whistles (new features) than the software plaintiff wrote with the older version of the program.

One of plaintiff's customers, who was using a program designed by Plaintiff using the older version 5, requested some changes in his program. In order to make the requested changes, Plaintiff had to purchase the current version of the program called Magic version 8. Before making the purchase, Plaintiff requested a copy of the current license for version 8 and a demo or evaluation program for version 8. (Opinion & Order).

Plaintiff received the demo program which worked until January 2000. (Opinion and Order). At that time the license expired and the time limitation built into the program caused it to cease functioning.

After evaluating the product, Mitch Geier, president of Plaintiff, negotiated to purchase the new development engine (and some technical support) (Opinion and Order) but only on condition that certain license terms were modified. Plaintiff discussed with the Salesperson, Kelly Urschel, that he had been involved in prior litigation with Magic.

He advised her that Plaintiff was interested in purchasing version 8, but that he had to make changes to the terms and

conditions of the sale by submitting a Purchase Order. He advised the salesperson that he could not just give her a credit card (Opinion and Order), but would send in a Purchase Order with modified terms and conditions that were integral to the deal. Kelly Urschel testified at depositions that she did not recall the specifics of the conversation other than asking for the credit card. Plaintiff then sent in a Purchase Order dated January 10, 2000, which contained the modifications to the license. The relevant modifications of the license were that:

> (1) Plaintiff's existing unlimited run time license (URTL) would apply to version 8
> (2) If new versions of the development engine were introduced, the URTL would apply provided that Plaintiff purchased the new development engine, (see Opinion and Order)
> (3) Lawsuits between the parties had to be in Middlesex County, New Jersey (Opinion and Order) (where Plaintiff's headquarters was located),
> (4) Any modification of the agreement had to be in writing SIGNED by both parties.

The Purchase Order and the check for $4,480 which referenced the Purchase Order were received, and accepted by the Vice President of Operations, Russell Taitz. Plaintiff's check cashed ("retained CECG's payment" Opinion and Order), and Defendant then orally notified Plaintiff that the Purchase Order had been accepted.

Plaintiff contends that the acceptance and cashing of the check creates a binding contract, see for example NJSA 2A:12-201(3)(c) [UCC § 2-201]. The record of the sale would normally be kept in the Accounting Department of Magic Enterprises and the person in charge of the Accounting Department was Russell Taitz.

It is Plaintiff's position that at that point, a firm-binding contract existed between the parties, and that the applicable license was as set forth in the Purchase Order (or the demo license as modified by the Purchase Order).

Defendant then faxed to Plaintiff certain keys and codes, i.e. the Product Authorization Key or PAK that was an integral part of the software product, (Opinion and Order) necessary to re-activate the demo or evaluation software into a fully operational product. This fax did not purport to add any new terms, delete any old terms, or in any way change or modify the license agreement, which the parties had agreed upon. The fax specifically denied being a license agreement, "This document does not constitute a software license" and went on to state that the keys and codes were being provided subject to the "license terms applicable" (Opinion and Order) to the software. Neither was there any consideration tendered by defendants in exchange for the imposition of any new terms. Plaintiff did not sign any modification agreement or fax. The "applicable" terms were those set forth in the Purchase Order. Since there was a writing with all the terms agreed upon (i.e. the Purchase Order), Plaintiff contends that the court erred by consideration or reference to other documents (i.e. the fax of the keys and codes and the expired license which accompanied the demo program) NJSA 2A:12-202.

When Defendant's salesperson, thereafter "shipped" (Opinion and Order) discs and presumably a new shrink wrap license, keys and codes, she acknowledged in depositions that the shipment was a "Mistake" since she had already faxed him the necessary keys and codes; she acknowledged in writing that the shipment was a "Mistake" and she directed plaintiff to disregard the shipment.

In reliance on the contract (purchase order), Plaintiff expended great amounts of time and resources in learning the new version of Magic, and writing code in the new version. Plaintiff spent several thousand hours re-writing code, importing old data to the new program, testing, and learning the new program of Magic 8.0. His hourly rate was $96-$120 per hour at the time. Plaintiff developed software with the intent to distribute it without charge as part of a marketing plan including distribution via the internet, what he characterized as "freeware." If plaintiff cannot market the product plaintiff has produced, all the time spent on it and the time developing the marketing plans will be lost, and plaintiff will suffer incalculable economic loses. Also, plaintiff now has customers operating their business on the programs written in the new version; those customers are now dependent on the software and are unable to revert to the previous version of the program as their data is now in the new program.

All of the above is undisputed. So why was there a problem you may ask.

After several months of writing programs using version 8 of Magic, Plaintiff discovered some problems with the software and sought assistance. (Opinion and Order). At that time, Plaintiff was advised that the Defendant "refused" to provide the assistance (Opinion and Order), claimed that it did not wish to honor the terms of the Purchase Order.

First, the Defendant's Vice-President claims he never received the second page of the Purchase Order containing the terms and conditions. The face page of the Purchase Order clearly says that it is subject to the terms on the reverse side. When asked to produce the original Purchase Order at depositions in California, the Vice President produced a one-page document, with the terms and conditions on the reverse

side of the one page document. He was unable to explain how he never got the second page, as it was a one-page document.

Vice President Russell Taitz, testified at depositions that Kelly Urschel was authorized by Magic to negotiate the sale in question within certain parameters, which parameters were not in writing, and that there were no written guidelines that would delineate the extent or scope of her authority. He acknowledged that the Purchase Order and the check which accompanied it were received by Magic on January 12, 2000. He was asked whether he deals with the terms of any purchase order and he responded, "I absolutely deal with the terms of purchase orders." Vice President Taitz based his refusal to honor the terms of the Purchase Order on his belief, under oath, that Magic never received the page that contained paragraph #4 (the condition that Magic would recognize the URTL as applying to Version 8 and later versions). Specifically Russell Taitz testified that he never received the second page of the Purchase Order containing the terms and conditions, i.e. "That we did not receive this page, the second page to P-4. [Purchase Order of January 10, 2001]," Mr. Taitz was then asked to retrieve the original Purchase Order from his records (the deposition was being conducted at Magic Enterprises Inc. headquarters in Irvine, California). When Mr. Taitz returned with the company's orange colored folder containing the original Purchase Order, Mr. Taitz was asked the following:

> Q. "* * * First of all, the original letter head on CECG, the Purchase Order, the notation in the lower left-hand corner about the terms and conditions on the reverse side. Is that on the original you have?"
> A. "Yes it is.
> Q. "And the Purchase Order appears to be a one-page document with terms and conditions or what

are called Terms of Purchase Order being the second side of that document. Correct?"

A. "Correct."

Mr. Taitz's mistake was a unilateral mistake and then acted upon it by refusing to honor the contract. His testimony established that he admitted to having made this unilateral mistake. The Judge noted this acknowledgment in his Opinion and Order saying that "MSE has explicitly conceded for the purposes of this motion that the Purchase Order had two sides, both of which were received by MSE." The Judge acknowledges that plaintiff raised the issue of unilateral mistake (Opinion and Order). The court either rejected or just ignored "unilateral mistake."

When Mr. Taitz realized that the original Purchase Order which he held in his hands was really a one page document, he attempted to shift gears, and expressed doubt as to whether and when the Purchase Order and check were received. He was then asked to retrieve the company records as to the date of receipt of the Purchase Order and Check and when he returned, the records which he produced showed that the Purchase Order and Check were both received on January 12, 2000.

Secondly, defendant and its attorneys wrongly assumed that there was a third license agreement or shrink wrapped license that Plaintiff received along with the keys and codes (thus leading to their legal analysis of the applicability of certain UCC Title 2 provisions dealing with conflicting terms of agreement). While a package was shipped from Defendant to Plaintiff on January 13, 2000 sometime after the faxing of the keys and codes, Plaintiff immediately called the salesperson involved in the transaction to inquire about the shipment in the box, only to be told that it was a "Mistake" since she had already supplied the keys and codes, and she directed Plaintiff to ignore

it and dispose of it (the package was never opened and was produced at depositions of Plaintiff's President in it's still unopened condition). This unopened package may very well contain another shrink-wrapped license, but since the package has never been opened, we do not know what precisely it contains. The Judge below assumed that such a license was "received," and he proceeded to give it effect, even though it did not comply with the contract requirement that any changes had to be in a writing signed by both parties. Also produced at depositions was another fax from the salesperson acknowledging that the package shipment was a "Mistake."

Thirdly, the Defendant has apparently changed it marketing strategy and claims that it no longer sells URTLs, although it acknowledges that it still recognizes the right of programmers who received URTLs for version of Magic 5.02 and prior, to continue to write programs without any royalty to Defendant. The reason that defendants still recognize or honor the URTLs is that the customer owning them paid their one-time royalty fee. Geier testified that he never asked if Magic was selling URTLs and was never told that they were not selling URTLs. It would not matter anyway, as he still owned one.

On motion for remand, the judge originally accepted the defendant's mistakenly assumed facts that were based upon the fallacious assumption that a third license agreement accompanied the keys and codes. (Opinion & Order of February 16, 2001). The acceptance of that mistaken assumption resulted in the denial of Plaintiff's motion to remand to the Superior Court of New Jersey, Middlesex County (where the suit was originally filed) since the non-existent third license agreement would have eliminated the requirement for venue in Middlesex County and substituted Orange County, California. (Opinion & Order of February 16, 2001). The Judge assumed that Geier

opened the package and thereby accepted the terms of the license in it. (Opinion & Order of February 16, 2001).

On the motion for reconsideration, the court came to the same result but this time by way of postulating that the fax of the keys and codes was referencing the original shrink wrapped license when it used the phrase "license terms applicable" to the software. The Judge agreed with the defendants' argument that by using the new keys and codes, the terms of the original license continued to govern the use of the software. "Defendants argue that it {the original license} continued to govern the use of its software once the Plaintiff resumed use of the product. We agree." (Opinion & Order). Such an analysis is prohibited by the terms of the Purchase Order, which requires all future changes to be in a writing signed by the parties. The reason that Plaintiff insisted on this condition of SIGNED written changes was the prior ruling of Judge Lifland, when he dismissed a prior suit between the same parties in September 1996, because the condition in question in that suit was an oral promise by Defendant and therefore unenforceable in violation of the Statute of Frauds. The requirement for a signed writing to modify the agreement was also designed to avoid any "last shot" problem. The term "last shot" is a legal term of derision applied to a writing after there is a firm binding contract, which purports to modify the contract.

Also in denying reconsideration, the court felt bound by its mistakenly assumed facts from the original motion for remand — Even though the fact that the shipment of a package, well after the supplying of the Keys and Codes, acknowledged by Defendant as being a "Mistake," was NEVER OPENED. This fact was a crucial fact not developed until depositions in the normal course of discovery, well after the timely motion for remand. Further, the Court totally ignored the contractual term that any change had to be in a writing signed by the parties.

Once the Purchase Order was accepted and the check cashed by the Vice President of the Defendant, and the keys and codes faxed to Plaintiff, the contract was complete. The terms of the Purchase Order prevented any further license changes, "This supersedes all past and future shrink-wrap licensing agreements." There is no applicable "last shot rule." The trial court only looked at the provision of the Purchase Order that dealt with the URTL. The court ignored the crucial term of a writing *signed* by the parties. The parties' conduct – specifically the defendant's acceptance of the Purchase Order, cashing the check, and faxing the keys and codes, "establishes a contract." That contract is the original shrink-wrapped license as modified by the Purchase Order. The Contract has not been changed by any writing signed by the parties as required by the Purchase Order. No objection to the terms was made for months after the keys and codes were supplied by Defendant. How could the Defendant object to terms and conditions it never even read or never knew existed? What kind of strange fiction is the court engaging in to re-write the contract and reinstate the original shrink wrap license without the terms and conditions of the Purchase Order

For the lower courts to delete the requirement of a writing signed by the parties, before there can be any changes, is to write a better contract for the Defendant than it entered into. We are not dealing with a "series of correspondence" as suggested by the trial judge. Rather, we are dealing with either a license agreement as modified by the Purchase Order, or just a Purchase Order.

Plaintiff was not trying to buy something that the Defendant did not previously sell and still recognizes. Plaintiff agreed to pay the current price for the new development engine for version 8 and also paid for technical support. Plaintiff already owned an URTL. Plaintiff paid a one-time fee for the URTL. Defendant

still recognizes the ability of Plaintiff to use that URTL on software which plaintiff writes and sells or gives away. A crucial term of the purchase was simply that defendant recognize the URTL for the new development engine. (Purchase Order Term #4).

The practice of recognizing the URTL for any purchase of a new version of the development engine had been the practice of the defendant up through version 5 of Magic. That practice was contained in numerous oral promises made to the developers who purchased the product and were ready to testify as to the oral promise. Much to the surprise of those developers, the oral promise on which they relied was held to violate the Statute of Frauds and was therefore unenforceable, resulting in the dismissal of any suits to enforce that promise.

Plaintiff had been admonished by Judge Lifland that if there was to be a promise which plaintiff wanted to enforce, then plaintiff had better get it in writing. Plaintiff learned the lesson which the Judge had taught, and when plaintiff sought to enforce the promise- now in writing- a new judge says to him that the promise will not be enforced for reasons that the plaintiff cannot understand.

Plaintiff's potential economic loses are huge. Plaintiff seeks essentially enforcement of the contract, i.e. injunctive style relief rather than money damages. The benefit of the bargain is that plaintiff can create software programs in Magic without the payment of any royalties, for as many programs and for as many "stations" as plaintiff desires (whereas prior to the purchase in January 2000, plaintiff could do that for Magic ver. 5.02c only). The benefit of the bargain is also that plaintiff may now distribute sample programs for free to potential customers without limit on the internet or otherwise without the payment of royalties to Magic, and plaintiff has developed programs for that purpose which it cannot distribute until this litigation is completed.

How is a small developer to protect its interests? Should a simple business transaction require the cost or intervention of an attorney?

When plaintiff appealed to the Court of Appeals, plaintiff requested oral argument in order to be able to respond to any concerns that the judges might have, especially as to facts which the parties had lived with for years, but the judges only a short period of time.

The Court of Appeals overlooked or misapprehended the fact that the Purchase Order given by plaintiff to defendant does contain the precise language which that court proceeded to rule as a matter of fact, was not given. The opinion of the Court was based upon a finding of fact made by the Court of Appeals in the first instance, not the District Court below, and that finding of fact is patently and grossly erroneous. Plaintiff requested oral argument to avoid the very situation which arose, i.e. the Court basing its decision on an assumed set of facts which is incorrect, and which could have been easily addressed at oral argument. The Court of Appeals wrongly assumed that plaintiff, when he submitted his Purchase Order would not have written certain language in it because if he had, then it would be reasonable to assume that the defendant would not have accepted the Purchase Order. The language which the Court found did not exist in the Purchase Order is actually there. The reason why the defendant accepted the Purchase Order with language the court thought was not there, is simply that the Vice-President of the defendant company acknowledges that he did not bother to read the terms of the Purchase Order and even swore that the never received the second page – that is, he swore he never received it, until he turned the single page document over to see the second side during depositions!

The factual issue of whether plaintiff used certain verbiage or its equivalent is a material factual determination that plaintiff was entitled to have decided at a plenary trial. In the exercise of its supervisory function, this court has the right to review the legal issues based on the findings of fact made below and whether they were against the weight of the evidence, etc.

If this Court determines that the Court of Appeals exercised some form of original jurisdiction or as a result of a de novo review of the record made a finding of fact in the first instance, Plaintiff has no place to appeal to, other than the Supreme Court of the United States; and it is fundamental to our system of jurisprudence, that plaintiff have at least one opportunity to correct an original mistake by a court or trier of fact.

The Court of Appeals lacked jurisdiction of this suit, if plaintiff is correct in its factual assertion that the language which the Court of Appeals was looking for, does exist in the document entitled "Purchase Order." Plaintiff has always insisted that Plaintiff's Purchase Order is the only document or the controlling document by its very language. That language required any suit to be in Middlesex County New Jersey only.

The wording of the documents was not disputed. The court stated the legal requirement that CECG could not make a material alteration to the contract * * *

> "* * * unless CECG's purchase order indicated that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1)."

That statement of the law is followed on the top of Page 11 of the Opinion with the factual finding, "The purchase order did not so indicate."

The Purchase Order dated January 10, 2000 states on the first page "Please Enter Our Order for the Goods Described herein, Subject to the Terms and Provisions Set Forth on the Face and Reverse Side of this Purchase Order."

The "Terms of Purchase Order" commences with term number 1, entitled "Acceptance" and reads as follows:

> "1. Acceptance. Commencement of performance pursuant to this Purchase Order constitutes acceptance hereof by Seller. If specified delivery dates cannot be met, Seller shall notify Buyer promptly of Seller's best alternative. The terms of this Purchase Order may not be modified, superseded or amended except in a writing signed by an authorized representative of Buyer. **Each shipment received by Buyer shall only be upon the terms of this Purchase Order, notwithstanding any terms contained in any quotation, acknowledgment, license agreement, invoice or other form of Seller, or Buyers acceptance of, or payment for, any shipment or any other act.**" [emphasis added]

The language emphasized above and as contained on the front of the Purchase Order does precisely what the law requires, i.e. it makes acceptance of the purchase order expressly conditional on the acceptance of the terms of the Purchase Order, i.e. it indicates that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1).

The Court of Appeals did not explain why the language quoted above does not meet the test; the court either "overlooked or misapprehended" the clear language of the Purchase Order. The language quoted above even insists that it prevails

"notwithstanding any terms contained in * * * any license * * *." That language specifically addresses and deals with the court's concern that the demonstration disc was accompanied by a license (which license and software had expired and ceased to work prior to plaintiff even placing its order).

The erroneous factual determination, made by the U.S. Court of Appeals in the first instance, is the lynch pin upon which the decision rendered rests. Until that decision, there never was any dispute that the language was in the Purchase Order. The legal argument that the parties engaged in before the Court below was whether the UCC § 2-207 even applied to the Purchase Order.

REASONS FOR GRANTING THE PETITION

POINT 1

U.S. CIRCUIT COURT OF APPEALS DOES NOT HAVE ORIGINAL JURISDICTION TO MAKE FINDINGS OF FACTS AS WAS DONE IN THE CASE AT BAR.

The statutory jurisdiction of the US Court of Appeals is set forth in 28 U.S.C. §§ 1291, *et seq.* Both sections 1291 and 1295 make it quite clear that the jurisdiction of the court is appellate review. There is nothing in the statutes which gives the court original jurisdiction to make findings of fact. Making findings of fact is something intentionally left to the District Court which is designed to handle trials and motions for summary judgment. This is the way our system is designed.

Even a *De Novo* review of the record could not justify the factual finding that the contract in question does not contain the questioned provision. Since the matter was resolved on motion for Summary Judgment, there was no jury trial and the factual record was sparse. What little record there was had to

be viewed in the light most favorable to the plaintiff on a motion for Summary Judgment. The relatively sparse record, nevertheless clearly establishes that the factual determination was simply wrong.

POINT 2

IF THE U.S. CIRCUIT COURT OF APPEALS HAS JURISDICTION TO MAKE INITIAL FINDINGS OF FACT, WHETHER AS A RESULT OF A *DE NOVO* REVIEW OF THE RECORD OR OTHERWISE, PLAINTIFF IS ENTITLED TO AT LEAST ONE LEVEL OF APPEAL FROM THAT COURT ON THE CLAIM THAT THE FINDING OF FACT IS CLEARLY, BLATANTLY OR OTHERWISE ERRONEOUS.

It would appear that every litigant is or should be entitled to at least one level of appeal- whether that appeal is from a state county court of limited jurisdiction directly to the Supreme Court of the United States as in *Brown v. Texas*, 443 U.S. 47 (1979) or from an initial and blatantly erroneous finding of fact made in the first instance by the U.S. Court of Appeals.

POINT 3

THE ACTION OF THE COURT OF APPEALS DENIED PLAINTIFF ITS SEVENTH AMENDMENT RIGHT TO A JURY TRIAL AS WELL AS ITS STATE RIGHT TO A JURY TRIAL.

If the U.S. Court of Appeals has jurisdiction to make initial findings of fact by way of a *de novo* review of the record, but substantive State Law gives plaintiff a right to jury trial, the U.S. Court of Appeals should have remanded the matter for a jury determination of the disputed issues.

Not only is there an Seventh Amendment right to Trial by jury, but such a right is a substantive right which existed under the common law and which is provided by the State of New Jersey to its litigants. *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 120 N.J. Super. 572, 295 A.2d 385 (Ch. Div. 1972). When a judge or panel of judges make the critical findings of fact that cause a litigant to have its claim dismissed, that litigant is being denied the valuable substantive right which New Jersey has promised to its litigants. Right to trial by jury is more than a procedural matter.

It is fundamental that only where there are no disputed factual issues of consequence can a judge or judges grant a motion for summary judgment; otherwise the facts must be resolved by the jury. In this case, there was a crucial factual issue of whether the contract contained a certain provision or not. This was not a case of the court interpreting a specific clause; rather the Court of Appeals said that the clause did not exist at all. In that finding, the court was blatantly wrong.

POINT 4

IF A PURCHASER OF A COMPUTER SOFTWARE PROGRAM NEGOTIATES A MODIFICATION OF THE SHRINK WRAP LICENSE WITH THE SELLER OF THE PROGRAM, THE SELLER CANNOT LATER REMOVE A STATE COURT SUIT TO THE FEDERAL COURTS AND AVOID THE PROVISION IN THE CONTRACT THAT PLACES EXCLUSIVE JURISDICTION FOR LITIGATION IN THE STATE COURTS.

If the Court of Appeals was factually wrong, i.e. the contract did contain the clause which the court apparently overlooked, then the federal court system lacked jurisdiction to hear the case in the first instance. The contract, i.e. the Purchase Order,

specifically provided that any litigation was to be filed in the court system in Middlesex County New Jersey which was the home office of CECG, Inc.

POINT 5

FOR THE COURT OF APPEALS TO DECIDE THE CASE ON A GROUND THAT WAS NOT ARGUED NOR BRIEFED BY EITHER PARTY, NOR PRESENTED TO THE PARTIES BY THE COURT FOR ARGUMENT, IS TO DENY PLAINTIFF SUBSTANTIVE DUE PROCESS OF LAW.

Our courts have expressed "grave doubts" that an issue can be foreclosed which is "an issue never substantively addressed by the party against whom it was decided * * *" *Procanik by Procanik v. Cillo*, 226 N.J. Super. 132, 154, 543 A.2d 985 (N.J. Super. A.D. 1988).

POINT 6

THE CONTRACT BETWEEN THE PARTIES VESTED EXCLUSIVE JURISDICTION IN THE STATE COURT SYSTEM OF NEW JERSEY, AND THE FEDERAL COURT SYSTEM SHOULD NOT HAVE SANCTIONED THE REMOVAL.

This is a case of a State Court litigant evading a contractual provision that places exclusive jurisdiction for litigation in the state courts, and the already overburdened Federal Court system, taking on a case over which it did not have jurisdiction. The same contract that the U.S. Court of Appeals erroneously claimed to lack a critical contract provision making its terms the exclusive, contains a critical provision vesting exclusive jurisdiction in the courts in Middlesex County New Jersey. This matter should be remanded to that court system for trial.

POINT 7

SUPREME COURT'S SUPERVISORY FUNCTION OVER THE U.S. COURT OF APPEALS.

The Supreme Court's supervisory function over the US Court of Appeals extends to the case at bar where plaintiff claims that (a) the Federal courts never had jurisdiction to start with, (b) the U.S. Circuit Court of Appeals exceeded its jurisdiction by making initial findings of facts, (c) The District Court Judge violated plaintiff's state substantive and federal constitutional rights to a jury trial on findings of fact and/or (d) the initial fining of fact by the U.S. Circuit Court of Appeals is blatantly erroneous.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this court grant Petitioner its Petition for a Writ of Certiorari.

Respectfully submitted,

ELIAS L. SCHNEIDER
Counsel of Record
C/O BRIGIANI COHEN & SCHNEIDER, PA
Attorney for Petitioner
603 Cranbury Road
East Brunswick, NJ 08816
(732) 257-0700

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED OCTOBER 8, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1036

CECG, INC., a corporation of the State of New Jersey,

Appellant

v.

MAGIC SOFTWARE ENTERPRISES, INC. and
MAGIC SOFTWARE ENTERPRISES, LTD.

On Appeal from the United States District Court for the
District of New Jersey
(Civil Action No. 00-cv-02262) District Judge:
Judge Harold A. Ackerman

Submitted Under Third Circuit LAR 34.1(a)
September 27, 2002

Before: BARRY, AMBRO and GARTH, Circuit Judges
(Opinion Filed: October 8, 2002)

OPINION

Appendix A

GARTH, Circuit Judge:

In this contractual dispute, Plaintiff-Appellant CECG, Inc., appeals the district court's grant of summary judgment to Defendant-Appellees Magic Software Enterprises, Inc. and Magic Software Enterprises, Ltd.

We will affirm the district court's judgment.

I.

Because we write solely for the benefit of the parties, we recount the facts and the procedural history of the case only as they are relevant to the following discussion.

This case involves a contractual dispute over the sale and licensing of Magic, a computer software program that can be used to develop other software. Appellees Magic Software Enterprises, Ltd. and Magic Software Enterprises, Inc. (hereinafter referred to collectively as "MSE") are, respectively, an Israel-based software company and its California subsidiary, which sells Magic software in the United States.

The parties have had a prior round of litigation. In 1988, CECG made its first purchase of Magic software. Magic software has two components: (1) a development "engine" that allows computer programmers to develop software; and (2) a "runtime module" that allows users of software developed through Magic's engine to operate that software. CECG claimed that when it purchased its first Magic development engine and purchased an accompanying single-

user runtime module, the MSE software salesperson made an oral promise to provide a free runtime module upgrade every time that CECG purchased an upgrade of the development engine. Later, when MSE stopped offering unlimited runtime modules in the United States, CECG sued MSE in federal court to enforce its claim that MSE was obligated to continue to provide CECG with free unlimited runtime module upgrades. The district court entered summary judgment for MSE on the basis that the Statute of Frauds required such a promise to be in writing to be enforceable. *CECG, Inc. v. Magic Software Enterprises*, No. 95-800 (JCL) (D. N.J. Sept. 13, 1996), at 10-11.

In September 1999, CECG asked MSE to upgrade its development engine to the most recent version of Magic software. CECG's president, Mitch Geier, requested a copy of the license agreement as well as a demonstration or evaluation copy of the software.

The Magic software license agreement sent to Geier along with the demonstration copy contained limitations on use, allowing the purchaser to

> [u]se the Product as licensed with respect to number of users. The Product is packaged in a manner to provide a specific number of users per package. If several persons use this Product at the same time or if one person uses it on more than one computer, you must pay one license fee for each copy being used. This includes use on a computer network. You must pay a license fee for the number of users specified in the Product

> package. You may not use the Product for more than the specified number of users. In case you have any questions regarding the number of users permitted you should immediately contact MSE.

Magic License Agreement, Def.-Appellee's App. 11. There was no mention of an unlimited runtime license in the license agreement. The agreement also provided that "MSE may from time to time revise or update its Products. Such updates and revisions will be supplied only to registered users and according to MSE's then prevailing update and support policies. MSE is not obligated to make any Product revisions or to supply them." *Id.* at 12.

The Magic license agreement contained a forum selection clause as well.[1] Additionally, the agreement contained a complete merger clause. *Id.* The license agreement provided for its own acceptance if the software package is opened: "OPENING THIS PACKAGE CONSTITUTES YOUR ACCEPTANCE OF THE LICENSE AGREEMENT SET FORTH BELOW." *Id.* at 11.

After receiving the evaluation software and license, Geier said that he did not accept the terms of the license agreement. After the evaluation period ended, Geier decided he wished to purchase the new version of the development engine. Geier recalls speaking with MSE and telling the salesperson that

---

1. The license agreement provides: "You acknowledge that any action or suit brought to enforce any right or remedy of this Agreement shall be subject to the exclusive jurisdiction and venue of the California State or Federal Courts sitting in Orange County, California." Magic License Agreement, Def.-Appellee's App. 12.

there had been prior litigation between CECG and MSE; and that though he wanted to purchase the software, he would not do so on the terms of MSE's license agreement. He told the salesperson that he would not provide a credit card, but instead would send in a purchase order with modified terms and conditions. *See* Appellant's Br. at 10; Appellee's Br. at 15.[2]

Geier then sent a purchase order to MSE along with a check. On its face, the purchase order listed a "Development Universal Client Server" ($3600) and "Technical support contract including updates as well as contract pricing for upgrades" at a price of $880 for one year. CECG Purchase Order, Def.-Appellee's App. 22. At the bottom of the front side of the purchase order, the order stated: "P.O. Number Must Be Referenced On Each Package, Packing Slip, Invoice, And/Or Any Correspondence. Please Enter Our Order for the Goods Described Herein, Subject to the Terms and Provisions Set Forth on the Face and Reverse Side of this Purchase Order." *Id.* The reverse side of the order contained several terms. The key provision at issue, relating to the unlimited runtime license, is contained within a paragraph with the caption "Intellectual Property Rights":

> This order shall also reinstate the buyer[']s understanding of the unlimited run time license. The seller shall update and upgrade the unlimited

2. The salesperson does not recall any discussion with Geier relating to prior litigation or the unlimited runtime license. See Appellee's Br. at 13 n. 3. She does apparently recall asking for a credit card number. See Appellant's Br. at 10 (citing Urschel Dep. Tr. at 25, 3 Pl.-Appellant's App. 372).

> runtime license currently called deployment without charge to the buyer whenever the buyer upgrades or updates the development tools or program generator to any version or renamed product so that the licensed versions and names shall match. . . . This reinstatement is irrevocable.

CECG Purchase Order T 4, Def.-Appellee's App. 23. The purchase order contained its own forum-selection clause.[3] The purchase order provided for its own acceptance and provided that it was the exclusive agreement between the parties.[4]

---

3. The forum-selection clause in the purchase order states: "This Purchase Order and the acceptance of it shall, as provided herein, constitute a contract made in, and to be governed in all respects by the laws of the state of New Jersey. Venue shall be in Middlesex County, NJ." CECG Purchase Order ¶ 8, Def.-Appellee's App. 23.

4. The purchase order provided:

> Commencement of performance pursuant to this Purchase Order constitutes acceptance hereof by Seller. If specified delivery dates cannot be met, Seller shall notify Buyer promptly of Seller's best alternative. The terms of this Purchase Order may not be modified, superseded or amended except in a writing signed by an authorized representative of Buyer. Each shipment received by Buyer shall only be upon the terms of this Purchase Order, notwithstanding any terms contained in any quotation, acknowledgment, license agreement, invoice or other form of Seller, or Buyer's acceptance of, or payment for, any shipment or any other act. *Id* ¶ 1.

Appendix A

MSE received the purchase order and deposited CECG's check. MSE then shipped a CD-ROM containing the program, along with another copy of the license agreement. CECG communicated with MSE to explain that it only required the "Product Authorization Key" (the codes) necessary to unlock the evaluation software for use. MSE faxed a Product Authorization Key to CECG, which stated that

> The PAK is an integral part of licensed software product identified on the front of this document . . . and is provided subject to the licence [sic] terms applicable to the software. Licensee shall maintain the PAK as confidential, and not transfer, disclose, or otherwise make it available to any third party. Any copies of the PAK must be limited to internal use by licensee only.

Def.-Appellee's App. 29. After CECG found that its old runtime module was incompatible with the new version of Magic's development engine, Geier again communicated with MSE in an attempt to obtain an unlimited runtime license in the belief that the contract obligated MSE to provide such a license.

According to Geier's notes, Russell Taitz, the vice president of operations for MSE, told Geier that MSE would not honor the purchase order, but would be willing to refund CECG the purchase price. Def-Appellee's App. 31.

Appendix A

CECG filed a complaint in the Superior Court of New Jersey, Middlesex County, on April 7, 2000, alleging breach of contract and seeking damages and specific performance. MSE removed the case to federal district court for the District of New Jersey on the basis of diversity jurisdiction. CECG filed a motion for remand to state court. The district court denied the motion, holding that there was diversity jurisdiction because the parties were diverse and the amount-in-controversy requirement was met; and that the venue provisions contained in CECG's Purchase Order and the Magic License Agreement negated one another pursuant to § 2-207 of the Uniform Commercial Code, as adopted by New Jersey. *CECG, Inc. v. Magic Software Enterprises*, No. 00-2262 (HAA) (D. N.J. Feb. 26, 2001), at 5-7, 8-11.

Following discovery, MSE filed a motion for summary judgment, and CECG filed a cross-motion for summary judgment and a motion for reconsideration of the district court's denial of remand to state court.

The district court denied CECG's motions and granted MSE's motion for summary judgment. The district court granted summary judgment for MSE on the contract claims, finding that the terms of MSE's license agreement and CECG's subsequent purchase order conflicted with one another with respect to whether MSE was obligated to provide CECG with an unlimited runtime license, and that, because the purchase order's term concerning the unlimited runtime license was "a material alteration of the contract," accordingly, under UCC § 2-207, "the contradictory term falls out of the parties' agreement." *CECG, Inc. v. Magic Software*

Enterprises, No. 00-CV-2262 (HAA) (D. N.J. Dec. 11, 2001), at 18 (citing N.J. Stat. Ann. § 12A:2-207).[5]

This timely appeal followed.

II.

We have jurisdiction to hear this appeal of the district court's final judgment in this diversity action pursuant to 28 U.S.C. § 1291. We have plenary review of a district court's order granting summary judgment. *See, e.g., Carter v. McGrady*, 292 F.3d 152, 157 (3d Cir. 2002). Accordingly, we apply those standards that the district court should have applied below. *Chisolm v. McManimon*, 275 F.3d 315, 321 (3d Cir. 2001). Summary judgment is proper if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Our function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

---

5. The district court also granted summary judgment to MSE on CECG's claim under the New Jersey consumer fraud statute, N.J. Stat. Ann. § 56:8-2, concluding that "CECG provides no evidence of deception" that would suffice to "establish that MSE engaged in any acts of fraud, unconscionable commercial practice, deception or false promises." *Id.* at 20. In addition, the district court denied CECG's motion for reconsideration of its earlier denial of CECG's motion for remand.

Appendix A

The parties do not dispute the contents of the writings that the parties have exchanged; rather, they disagree on the documents' legal effect. There are therefore no genuine issues of material fact; the only question before us is which party is entitled to judgment as a matter of law.

Section 2-207 of the Uniform Commercial Code governs the transaction between CECG and MSE.[6] In *Step-Saver Data*,

---

6. UCC § 2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract

(Cont'd)

Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991), a case which both parties cite as controlling, we analyzed the effect of contradictory documents relating to the sale of software: the buyer's telephone order (followed by a purchase order) and the seller's software box-top license. *See id.* at 9596. We held that UCC § 2-207 governed the transaction, stating that "[i]n the absence of a party's express assent to the additional or different terms of the writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed," with any gaps to be filled by the UCC's provisions. *Id.* at 99 (footnote omitted).

Similarly, in the dispute between CECG and MSE, the initial license agreement sent by MSE along with the evaluation copy of the software became effective when CECG obtained and installed the software. When CECG submitted its purchase order and check to buy Magic software, CECG had objectively manifested its acceptance of the terms of the license agreement. To the extent that the reverse side of the purchase order contained additional or different terms, such terms, if they constituted material alterations of the contract, would drop out of the contract formed, unless CECG's

---

(Cont'd)

> for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

N.J. Stat. Ann. § 12A: 2-207.

purchase order indicated that "acceptance is expressly made conditional on assent to the additional or different terms." UCC § 2-207(1). The purchase order did not so indicate.[7] The provision on the reverse side of CECG's purchase order that allowed for CECG to receive a unlimited runtime license at no additional cost for each purchase of a new version of Magic's development engine constituted a material alteration of the contract and therefore did not become part of the contract.

Accordingly, we will affirm the district court's grant of summary judgment to MSE on CECG's contract claims. We also will affirm the district court's grant of summary judgment to MSE on the consumer fraud claim, as CECG has not made any argument of substance on appeal that the district court erred.[8]

---

7. Even if acceptance were expressly conditional on assent to these terms, and thus there were no written contract, the conduct of the parties established a contractual relationship. UCC § 2-207(3) provides that the conduct of both parties can establish a contract, and that, to the extent that there is no agreement, the UCC fills any gaps in the contract. Both parties clearly conducted themselves in a manner that reflected that there was a contractual relationship; the disagreement is as to what the terms of the contract are. The writings of the parties, however, do not agree on whether MSE is obligated to provide CECG with an unlimited runtime license, and there is no provision of the UCC that would allow for CECG to receive an unlimited runtime license.

8. CECG makes only the conclusory statement that "[t]he sale of the merchandise by defendant and its subsequent conduct entitles the plaintiff to its day in court on the issue of Consumer Fraud." (Cont'd)

Appendix A

III

Plaintiff also appears to appeal the district court's denial of remand.[9] We have plenary review over a district court's denial of remand. See *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 665 (3d Cir. 2002).

CECG argues that the district court erroneously deleted the conflicting terms as it viewed the forum-selection provisions in CECG's purchase order and in MSE's license agreement as conflicting terms under UCC § 2-207. *See* Appellant's Br. at 16-17.

Forum selection clauses are material terms to a contract. *See, e.g., Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611, 621 n. 13 (11th Cir. 2001) ("arbitration clauses, like other kinds of forum selection clauses, are generally considered material terms under state law variants of the Uniform Commercial Code."). Based on our analysis of the conflicting writings, then, UCC § 2-207 requires that the conflicting term in CECG's purchase order either must give

---

(Cont'd)

Appellant's Br. at 34. Without anything more, we will not upset the determination of the District Court.

9. The district court denied plaintiff's motion for remand. Plaintiff moved for reconsideration, which was denied. CECG requests remand as a possible form of relief. *See* Appellant's Br. at 38-39. It is not clear, however, whether plaintiff appeals the denial of its motion for reconsideration or the denial of its motion for remand. We will assume the latter.

way to MSE's forum-selection clause, or must drop out because of the conflict between MSE and CECG's writings. *See* UCC 2-207(3).

Accordingly, there is no basis for remanding the case to New Jersey state court. We will affirm the district court's denial of CECG's motion for remand.

IV.

For the foregoing reasons, the judgment of the district court will be AFFIRMED.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Leonard I. Garth

Circuit Judge

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 12, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

00-CV-2262 (HAA)

CECG, Inc., a corporation of the State of New Jersey,

Plaintiff,

v.

MAGIC SOFTWARE ENTERPRISES INC., and MAGIC SOFTWARE ENTERPRISES LTD.,

Defendants.

FILED
DEC 12, 2001
ENTERED ON THE DOCKET
DEC 12, 2001

OPINION & ORDER

ACKERMAN, District Judge:

This matter comes before the Court on several pre-trial motions brought by both parties. Defendants Magic Software Enterprises, Inc., ("MSE") and Magic Software Enterprises Ltd. ("Magic Ltd.") have moved for summary judgment,

Appendix B

Plaintiff CECG, Inc. ("CECG") has cross moved for summary judgment and submitted a motion for reconsideration. For the following reasons, Defendants' motion for summary judgment is GRANTED and CECG's motions for summary judgment and reconsideration are DENIED.

I. Background

This case arises from a contractual dispute over the sale of Magic, a computer program that facilitates the development of other computer software. Magic is produced by Magic Ltd., an Israeli software corporation and distributed in the United States by Magic Ltd.'s subsidiary, MSE, a Californian corporation. CECG, the Plaintiff in this action, is a New Jersey Corporation that uses Magic to create customized software for its clients. This case arises from a disagreement between CECG on the one hand and MSE and Magic Ltd. on the other, over the distribution of the latest version of the Magic software, version 8.x. The central issue for this Court to determine is on what terms MSE agreed to sell Magic 8.x to CECG.

Magic is distributed in two components: (i) the development engine; and (ii) the runtime module. The development engine enables programmers to create new software for their clients. As part of its marketing strategy, MSE allows programmers to use the development engine on a trial basis for free to encourage them to use its software. Over time, Magic Ltd. has offered newer versions of this component as it has developed improvements to the software. In order to distribute software created by the development engine, however, programmers must purchase the second component

of Magic called the runtime module. The runtime module essentially allows clients, or "end users" to operate software that has been created using Magic. Magic Ltd. offers several types of runtime modules. These range from those that permit a single user to run software from a desktop computer to more sophisticated modules that allow a large number of Lasers to use the new software over the Internet.

When CECG began using Magic Ltd.'s products to design software in 1988, the initial price for the development engine was $199 and two versions of the run time module were available: a single user license for $59 or an "unlimited" license for $699. CECG initially purchased development engine version 2.5 and a compatible single user runtime module. CECG claimed that when it purchased the development engine the salesperson made an oral promise to provide a free runtime module upgrade every time CECG purchased another version of the development engine. CECG received a free upgrade of a single user runtime module in 1989 and then acquired an unlimited runtime module in 1990. CECG believed that the original promise of a free runtime upgrade entitled it to free unlimited runtime module upgrades into perpetuity. In June 1993, however, MSE ceased offering unlimited runtime modules in the United States.

Subsequently, CECG initiated litigation in the District of New Jersey to enforce MSE's oral promise of a free unlimited runtime license and alleging commercial fraud. CECG argued that it was entitled to a free upgrade of its unlimited runtime license with every purchase of an updated version of the development engine and that in the event that it was not entitled to such an upgrade, it was induced to buy

the development engine through commercial fraud. District Judge Lifland dismissed CECG's suit on summary judgment as the alleged promise violated the statute of frauds and there was no evidence of commercial fraud. See *CECG, Inc. v. Magic Software Enterprises*, No. 95-800, slip. op. (D.N.J. Sept. 13, 1996).

Toward the end of 1999, CECG was still using MSE's software and sought to upgrade its development engine to Magic 8.x. CECG's president, Mr. Geier, contacted MSE regarding the potential purchase of an upgrade. MSE then faxed him a price list, a description of MSE's products and MSE's standard software license agreement (the "License Agreement"). The price list did not include any mention of an unlimited runtime license. The License Agreement instructed the purchaser that he or she could

> Use the Product as licensed with respect to the number of users. The Product is packaged in a manner to provide a specific number of users per package. If several persons use this Product at the same time or if one person uses it on more than one computer, you must pay one license fee for each copy being used. This includes use on a computer network. You must pay a license fee for the number of users specified on the Product package. You may not use the Product for more than the specified number of users. In case you have any questions regarding the numbers of users permitted you should immediately contact MSE.

Appendix B

Deposition of Urshel, Ex. 1, Magic License Agreement for North America Only, General Copying Restrictions, at 1. The License Agreement also advised purchasers to

> Carefully read all the terms and conditions of this Product License Agreement prior to opening this package, If you do not agree to these terms and conditions, please return the unopened disk package and the components of this Product to the place of purchase and your money will be refunded. No refunds will be given for Products with an opened disk package or missing component(s). Only if you accept each of the terms below should you open this package and use the enclosed Product.

Id., at 1. The License Agreement contained a forum provision, which recited that "any action or suit brought to enforce any right or remedy of this Agreement shall be subject to the exclusive jurisdiction and venue of the California State or Federal Courts sitting on Orange County, California." *Id.*, Governing Law and Forum Selection, at 2. The License Agreement also contained language regarding its duration, stating that

> [t]he License is valid until terminated. Licensee may terminate it by destroying the programs and documentation and all copies thereof. If any of the terms and conditions of the Agreement are violated by the Licensee, in addition to all other legal rights and remedies, MSE may terminate this license. Upon termination, Licensee shall destroy the Product.

Id., at 2, Terms of the License. After CECG reviewed these documents, it requested the use of a demonstration copy of the new development engine. MSE then sent to CECG a copy of the demonstration software and codes that enabled CECG to use the software on a trial basis until January 2000.

In January 2000, CECG contacted MSE and requested another price list. After receiving the second price list, CECG contacted MSE to place an order. When the operator requested payment, CECG informed her that it would not pay by credit card, but instead would forward a copy of its own purchase order with its own terms and conditions. CECG then drafted its own purchase order (the "Purchase Order"), dated January 10, 2000, and forwarded it to MSE.

The Purchase Order's front page indicated that the price for the development engine was $3,600 and one year of technical support was $880. CECG enclosed a check for the combined amount of $4,480. In addition to specifying the product, quantity, and price that CECG wanted, the Purchase Order contained a number of supplementary terms and conditions. The reverse side of the Purchase Order contained language that allegedly obliged MSE to provide, without charge, an unlimited runtime module for use with version 8.x and all subsequent versions of the development engine. The Purchase Order required MSE to make CECG's old runtime module compatible with version 8.x and later versions of the development engine. It specifically stated:

> This order shall reinstate the buyers [sic] understanding of the unlimited run time [sic] license. The seller shall update and upgrade the unlimited

> runtime license currently called deployment [sic] without charge to the buyer whenever the buyer upgrades or updates the development tools or program generator to any version or renamed product so that the licensed versions and names shall match shall march [sic]. This reinstatement is irrevocable.

Purchase Order, ¶ 4. A separate paragraph also selected Middlesex County, New Jersey, as the venue for resolving prospective contractual disputes.

MSE received the Purchase Order, retained CECG's payment, and shipped the discs needed to install Magic version 8.x. Included with the discs, MSE forwarded another copy of its standard "shrink wrap" license agreement (the "License Agreement"). Before it received this package however, CECG contacted MSE to explain that it was already running an older version of the development engine and therefore it did not need to install entirely new software. Instead. CECG merely needed a set of codes, called the Product Authorization Key, or PAK, to convert its development engine to version 8.x. After this conversation, MSE provided the required codes by fax and CECG was able to make the conversion. The fax MSE sent with the relevant codes contained the following language: "The PAK is an integral part of the licensed software product identified on the front of this document ("The Software") and is provided subject to the license terms applicable to the software." Deposition of Urshel, Exs. 6, 7.

Appendix B

Shortly after it completed the conversion to Magic 8.x, CECG learned that its old runtime module was not compatible with its new development engine. Compl., ¶¶ 12-13. Although CECG could create new software using version 8.x, its clients could not operate those programs. *Id.*, ¶ 22. According to CECG, its Purchase Order obligated MSE to remedy this compatibility problem without charge. When MSE refused, CECG brought this suit.

II. Procedural History

CECG commenced this action on April 17, 2000 in the New Jersey Superior Court, Middlesex County, Chancery Division. The Complaint set forth causes of action for breach of contract and consumer fraud and sought equitable relief as well as damages.

Defendants removed the action to this Court on May 10, 2000 on the basis of diversity between the parties. CECG moved for remand claiming the amount in issue was below the threshold for diversity actions and that its contract provided for exclusive jurisdiction in Middlesex County. On February 16, 2001 this Court issued an opinion denying CECG's motion for remand finding that the amount in issue exceeded that required for diversity jurisdiction and that the contract's forum clause was not binding on the defendants.

There are three-motions currently pending before this court: (1) CECG moves for reconsideration of the Court's Order denying its motion to remand; (ii) Defendants have moved for summary judgment on all claims; and (iii) CECG has cross moved for summary judgment on the issues of

liability and damages. The Court will begin by addressing the motion for reconsideration before turning to the motions for summary judgment.

III. Motion for Reconsideration

CECG brings its Motion for Reconsideration — styled "Motion for Consideration" — based on its argument that the Court erroneously assumed that the Plaintiff accepted MSE's license Agreement enclosed in the second shipment of discs. CECG argues that "during discovery, it was established without contradiction that nothing of the kind occurred." CECG's Motion for consideration, ¶ 3. CECG goes on to argue that while it did receive a license with the second shipment of discs after Magic received the CECG Purchase Order, this license was sent in error and the discs were never opened. As a result, CECG argues that the only document that controls the relationship between the parties is its Purchase Order.

In opposition to CECG's motion for reconsideration, Defendants make several arguments. As a preliminary matter, they point out that a motion for reconsideration must be based on material that the court overlooked at the time it made its decision and that the arguments forwarded by the Plaintiff rely on material from depositions that were conducted *after* the Court's Order. Defendants argue that the form of CECG's motion fails to adhere to Local Rules 7.1 (g) and 7.2(a) and in any event the original decision of the court was correct as it comported with the Uniform Commercial Code. Paraphrasing their original arguments regarding the motion to remand, Defendants point out that there is a dispute between

two contracts in this case and that UCC § 2-207 provides that where there is no one document that governs the relationship between the parties and two contractual provisions conflict, the terms cancel each other out and the parties' conduct is governed by the UCC. In this case, Defendants argue that the impact of this law is that CECG's forum selection clause is voided and the Court, therefore, has jurisdiction.

It is well-established that a motion for reconsideration under Rule 7.1 (g) is an extremely limited procedural vehicle. *See Resorts International, Inc. v. Greate Bay Hotel and Casino, Inc.*, 830 F. Supp. 826, 831 (D.N.J. 1992). Rule 7.1(g) provides that:

> A motion for reargument shall be served and filed within 10 days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge. There shall be served with the notice a brief setting forth concisely the matters or controlling decisions which counsel believes the Judge or Magistrate Judge has overlooked.

Local Civil Rule 7.1(g). As the language of the rule indicates, an applicant for a motion for reconsideration must set forth "the matters or controlling decisions" which the litigant believes the court has overlooked. See Rule 7.1(g). Thus, a motion for reconsideration will be successful only where dispositive factual matters or controlling questions of law were presented to the court but not considered. *See Pelham v. United States*, 661 F. Supp. 1063, 1065 (D.N.J. 1987).

Appendix B

The only proper ground for granting a motion for reconsideration under Rule 7.1 (g) is that matters or decisions overlooked by the court might reasonably have altered the result. *See G-69 Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990). Where the motion merely raises a party's disagreement with the court's initial decision, that "should be dealt with in the normal appellate process, not on a motion for reargument under Local Rule 12(I) [now renumbered as Rule 7.1 (g)]." *Florham Park Chevron, Inc., v. Chevron U.S.A. Inc.*, 680 F. Supp. 159, 162 (D.N.J. 1988).

In this case, CECG does not allege that the Court overlooked any controlling decisions in its original decision. Instead, CECG argues that the Court mistakenly assumed facts that were subsequently contradicted in depositions. As an initial matter, subsequent factual revelations cannot ground a motion for reconsideration. As argued by the Defendants, the Court could not "overlook" matters that had yet to be proven. Regardless of the fact that CECG points to subsequent evidence from depositions, however, this Court specifically addressed the issue in question in its original decision. CECG argues that the Court erroneously assumed that the controlling contract was that sent by mistake by MSE in response to CECG's Purchase Order. However, in its Opinion, the Court recognized that

> CECG attempted to avoid the impact of the unopened License Agreement by arguing that it neither read not assented to the License Agreements terms. (Greier Cert. at ¶¶ 10-15.) In CECG's view, the Purchase Order was the last writing and, as a result, constituted the final expression of the

> parties' agreement. This reasoning is flawed. The U.C.C. rejects the "last shot rule." As a result, a party cannot unilaterally dictate the terms of a contract simply be sending the last written form. *See Step-Saver*, 939 F.2d at 99. Thus, the Purchase Order is not binding merely because it was final.

Opinion and Order, at 11 n.11. Given that the Plaintiffs motion is predicated on evidence that was discovered *after* the Court's decision through depositions, and explicitly addressed as a hypothetical in its original Order, Plaintiffs motion for reconsideration is denied.

IV. Summary Judgment Motions

Defendants Magic Ltd. and MSE have brought a motion for summary judgment on both the contract and the consumer fraud claims asserted by CECG. Defendants argue that CECG's claims for breach of contract are barred by the Statute of Frauds, contradicted by Section 2-207 of the Uniform Commercial Code ("UCC"), and that the contract is unenforceable and illegal because it contravenes the Robinson-Patman Act, 15 U.S.C. § 13. Defendants further argue that since they honored their contractual obligations they cannot be accused of violating the Consumer Fraud Act. In addition to its responses to the Defendants' arguments on summary judgment, CECG has also submitted its own motion for summary judgment requesting "partial summary judgment on liability and immediate specific performance." Plaintiff's Brief in Support of Plaintiff's Motion for Summary Judgment ("Pl. Br."), at 15. The Court will consider these motions together.

Appendix B

V. Standard of Review

Pursuant to Rule 56(c), a District Court is directed to grant a motion for summary judgment

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). *See also Todaro v. Bowman*, 872 F.2d 43, 46 (3d Cir. 1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987). In other words, "[s]ummary judgment may be granted only if there exists no genuine issue of material fact that would permit a reasonable jury to find for the nonmoving party." *Miller v. Indiana Hosp.*, 843 F.2d 139, 143 (3d Cir. 1988). All facts and inferences are construed in the light most favorable to the non-moving party. *See Peters v. Del. River Port Auth. of Pa. and N.J.*, 16 F.3d 1346, 1349 (3d Cir. 1994).

The substantive law will identify which facts are "material." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. *Id.*

The party seeking summary judgment always bears the initial burden of production, i.e., of making a prima facie

showing that it is entitled to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This may be done either by demonstrating there is no genuine issue of fact and that the moving party must prevail as a matter of law, or by demonstrating that the nonmoving party has not shown facts relating to an essential element of the issue for which it bears the burden. *Id.* at 322-23. Once either showing is made, the burden shifts to the nonmoving party who must demonstrate facts supporting each element for which it bears the burden as well as establish the existence of genuine issues of material fact. *Id.* at 324.

However, at the summary judgment stage, a court may not weigh the evidence or make credibility determinations; these tasks are left to the fact-finder. *See Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1230 (3d Cir. 1993). Therefore, to raise a genuine issue of material fact, the summary judgment opponent "'need not match, item for item, each piece of evidence proffered by the movant,' but simply must exceed the 'mere scintilla' standard." *Id.*; *see also Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant].").

It is clear, however, that if a moving party satisfies its initial burden of establishing a *prima facie* case for summary judgment, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, "[t]here must . . .

be sufficient evidence for a jury to return a verdict in favor of the nonmoving party; if the evidence is merely colorable or not significantly probative, summary judgment should be granted." *Armbruster v. Unisys Coop.*, 32 F.3d 768, 777 (3d Cir. 1994).

VI. Discussion

The Defendants seek summary judgment on both the Plaintiff's contract claims and its claim of consumer fraud. The Court will consider each in turn.

The Contract Claims

In the present case, Defendants assert that summary judgment should be entered against CECG because UCC § 2-207, prevents enforcement of CECG's Purchase Order's terms that are inconsistent with MSE's License Agreement. Defendants suggest that in cases where there is a conflict between material terms of two form agreements, the conflicting terms are canceled out and the contract between the parties is enforceable only as to the terms upon which the parties agree. Here Defendants argue that the disagreement over the scope of the runtime license amounts to a disagreement over the quantity of goods at issue. Defendants argue that the Purchase Order is a "material alteration of the prior oral communications of the parties, as well as to the terms on the face of the purchase order itself, to the price list which MSE has previously sent to CECG, and to the MSE documentation which accompanied the software which was sent to CECG." Brief in Support of Defendants' Motion for

Summary Judgment, at 14. Defendants conclude that, in light of the conflict over a material term, the UCC operates to exclude that term from the agreement.

Plaintiffs argue in response that the License agreement expired on December 31, 1999 when the codes for the trial software ceased to function. As a result, Plaintiff suggests that there is only one document that controls the conduct between the parties: the CECG Purchase Order CECG then suggests that any difference of opinion regarding the force of the Purchase Order was a unilateral mistake on the part of MSE. The Plaintiff has also submitted a cross-motion for summary judgment requesting "partial summary judgment on liability and immediate specific performance." Plaintiffs Brief in Support of Plaintiff's Motion for Summary Judgment, at 15. In its motion, CECG provides lean support for essentially four separate theories that entitle it to specific performance: (i) unilateral mistake; (ii) the conduct of the parties; (iii) the balance of equities; and (iv) estoppel.

CECG begins by characterizing MSE's acceptance of its Purchase Order and subsequent repudiation of its terms as a unilateral mistake. Based on the same facts, CECG argues that it has relied on the terms of its Purchase Order to its detriment and thus the contract should be enforced. CECG then states the maxim that "Equity Regards as Done That Which Ought to be Done," and asserts that while MSE's previous promise was oral, "[i]t may have taken TEN years, but Defendant's agreement is now in writing and enforceable." Plaintiffs Brief In Support of Plaintiff's Motion For Summary Judgment, at 13. CECG also appeals to the maxim "Where a Loss Must Be Borne By One of Two

Innocent Persons Equity Will Impose the Loss on That Party Whose Act First Could Have Prevented the Loss," and argues that the Defendants should bare the loss in this case as the root of the conflict lies in the Defendant's unilateral mistake. *Id.* at 15. CECG goes on to note that in the past, MSE has prevailed in other contractual disputes by arguing in favor of its shrink wrap licenses. Finally, CECG argues that because MSE has argued in previous litigation that its contract controlled because it was the last writing between the parties, MSE should be estopped from arguing that the last writing does not control in this case.

In response, MSE faults CECG for failing to address the impact of the U.C.C. on the parties' contract dispute. MSE argues that the doctrine of unilateral mistake has no application to the facts of this case. Defendants frame their response to CECG's conduct of the parties arguments in terms of the formation of contract. As an initial matter, Defendants argue that this analysis should be governed by the U.C.C. However, they go on to state that even if the Court were to look for the formation of a contract by operation of the conduct of the parties, that MSE never accepted an offer to purchase an unlimited runtime license as claimed by the Plaintiff. Defendants argue that "[e]ven if MSE's performance by sending the Product Authorization Key is deemed to be the acceptance, that performance did not include the free perpetual unlimited runtime upgrade." Brief In Opposition to Plaintiff's Cross-Motion for Summary Judgment, at 6. In opposition to CECG's equitable arguments, Defendants submit that the Court's contract analysis should govern the relationship and that the statute of frauds prevents enforcement of an oral promise that has already been litigated

by the Plaintiffs. Defendants suggest that CECG's arguments with respect to estoppel are founded on an erroneous apprehension of the facts, and a distortion of its legal position. Specifically, Defendants argue that CECG's Purchase Order is not the last writing between the parties. Contrary to Plaintiff's assertion that the initial License Agreement expired with the trial period for the development engine, Defendants argue that a fair reading of the License Agreement reveals that it "applied to whatever software CECG might purchase, not that its terms expired at the end of the demonstration period." *Id.* at 9. Finally, Defendants argue that specific performance of the contested contract term is not available as the term is not part of the parties agreement.

The question of whether this contested term is part of the parties' agreement is the cornerstone of this case. Given their extensive commercial conduct, the Court has little difficulty finding that a contract exists between these parties. The question that remains, however, is what the terms of that contract are.

To resolve this question, the Court must examine three documents: the License Agreement, the Purchase Order and MSE's fax containing the PAK. While there is some dispute over the interpretation of its duration, both parties agree that CECG received a license agreement from MSE when it requested the trial use of MSE's development engine in September of 1999. Both parties also agree that MSE received CECG's Purchase Order in January of 2000. MSE has explicitly conceded for the purposes of this motion that the Purchase Order had two sides, both of which were received by MSE. Reply Brief in Support of Defendants' Motion of

Appendix B

Summary Judgment, at 4. CECG also admits that after it sent MSE payment and its purchase order, that CECG received a fax containing the PAK that included the codes for the continued use of the development engine. The parties do not dispute the contents of these various communications nor do they dispute the facts surrounding their exchange. Their current argument centers around the legal force of these documents. As a result, for the purposes of this Court's consideration of their respective summary judgment motions, there are no genuine issues as to any material facts with regard to the content of the parties' contract and all that remains is for the Court to determine which party is entitled to judgment as a matter of law.

In this case, the parties have not reduced their agreement to one signed document. Instead, there is a series of correspondence that begins with the MSE's License Agreement that accompanied the trial version of its development engine that was sent to the Plaintiff in September of 1999. This document is a classic "shrink wrap" license. Neither party suggests that the License Agreement did not govern the use of the development engine during CECG's trial period. While Plaintiff argues that this contract expired on December 31, 1999 when its trial period ended. Defendants argue that it continued to govern the use of its software once the Plaintiff resumed use of the product. We agree.

MSE's License Agreement states that it is "valid until terminated [and that the] Licensee may terminate it by destroying the programs and documentation and all copies thereof." There is no evidence that CECG terminated the License agreement by destroying the development module.

Quite the contrary, CECG paid $4,480 for the codes to continue to use the development engine. As the Defendants argue in their brief in opposition to Plaintiff's cross-motion for summary judgment, the License did not terminate with the end of the trial period, rather it "applied to whatever software CECG might purchase." Brief In Opposition to Plaintiff's Cross-Motion for Summary Judgment, at 9. The conclusion that the License Agreement survived the end of the trial period for the development engine is further fortified by the fax sent to CECG by MSE that contained the codes CECG required to continue using MSE's software. That fax stated on its face that it provided the codes "subject to the license terms applicable to the software." As a result, the subsequent transmission of the codes that allowed CECG to resume use of the development engine were provided subject to the terms of the original License Agreement.

In addition to their argument that the License Agreement had expired, Plaintiff also argues that its Purchase Order should control as it is the last writing between the parties. However, as the Third Circuit has explained, the U.C.C. has rejected the so called "last shot" rule and rendered the chronology of exchanged forms between merchants irrelevant because "it would be unfair to bind the buyer of goods to the standard terms of the seller, when neither party cared sufficiently to establish expressly the terms of their agreement, simply because the seller sent the last form." *Step-Saver Data Systems, Inc. v. WYSE Technology*, 939 F.2d 91, 99 (1991). In light of this reasoning, this Court need not determine which of the License Agreement, or the Purchase Order was technically the last document to be exchanged. Instead, once we have determined that the License Agreement

remains in effect, we must establish what other documents may also control the relationship between the parties and whether those documents conflict with the License Agreement.

For the purposes of this motion, neither party disputes that CECG submitted a Purchase Order that contained terms and conditions regarding the use of its runtime module. The Purchase Order's provision that purports to grant CECG the right to free upgrades of its unlimited runtime license is plainly at odds with the express language of the License Agreement that restricts the use of the product. The Third Circuit has stated that in circumstances like these, where the parties' "conduct establishes a contract, but the parties have failed to adopt expressly a particular writing as the terms of their agreement, and the writings exchanged by the parties do not agree, UCC § 2-207 determines the terms of the contract." *Step-Saver Data Systems, Inc., v. Wyse Technology*, 939 F.2d 91, 98 (3d Cir. 1991). In circumstances where a merchant accepts a contract with a writing that states additional terms, UCC § 2-207 provides that those terms become part of the contract except where: "(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received." N.J.S.A. 12A: 2-207. As the terms of the Purchase Order introduce an obligation to provide a product to the Plaintiffs that Defendants no longer provide to anyone, the term is clearly a material alteration of the contract.

Appendix B

As this court noted in its decision on CECG's motion to remand issued on February 16, 2001,

> Under the U.C.C., conflicting terms cancel each other out. See N.J.S.A. 12A:2207, cmt. 6 (construing a different term in an acceptance as an objection to the corresponding term in the offer and stating that "the conflicting terms do not become part of the contract"); see *[Northrop Corp. v. Litronic Industr.*, 29 F.3d 1173, 1178 (7th Cir. 1994)] (noting that "the majority view is that the discrepant terms fall out and are replaced by suitable UCC gab-filler"); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579-80 (10th Cir. 1984) (distinguishing between additional terms, which may become part of the contract, and different terms, which knock each other out). Here, the License Agreement and the Purchase Order contain different . . . terms. Those terms nullify each other.

Just as this Court found in the earlier motion, here terms of the License Agreement and that of the Purchase Order directly contradict each other with respect to the question of whether MSE is obligated to provide an unlimited runtime license. As a result, the contradictory term falls out of the parties' agreement.

As the Third Circuit has recognized, it is not the role of the courts to create different or a better contracts than the parties themselves have entered into. *Con Air. Corp. v. Old Dominion Freight Line, Inc.*, 22 F.3d 529, 534 (3d Cir. 1994).

In this case, the parties have exchanged a series of correspondence that relate to the distribution of software created using the Magic development engine, but none of these writings evidence a meeting of the minds with respect to the essential term at issue in this case: the existence of an unlimited runtime license. Absent such an indication, it is not up to this court to insert into the contract what the parties themselves have failed to agree upon.

Given the court's determination that the contract does not contain a provision entitling CECG to an unlimited runtime license, no reasonable jury could find in favor of CECG on its claim for specific performance of the contested contract provision. Therefore, CECG's cross-motion for entry of summary judgment on its contract claim and immediate specific performance is denied. Conversely, Defendant's motion for entry of summary judgment dismissing CECG's contract claim is granted. In light of the Court's determination regarding the effect of UCC § 2-207, there is no need to address Defendant's claims regarding the effect of the Statute of Frauds or the applicability of the Robinson-Patman Act.

The Commercial Fraud Claim

Defendants also seek summary judgment with respect to CECG's consumer fraud claim. CECG alleges that MSE committed commercial fraud under N.J.S.A. § 56:8-2 and New Jersey common law. Defendants argue that the court should enter summary judgment because MSE has fulfilled its contractual obligations to CECG. The consumer fraud statute provides:

Appendix B

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

N.J.S.A. § 56:8-2. Even accepting all of CECG's evidence as true, and viewing it in the light most favorable to it, CECG cannot establish that MSE engaged in any acts of fraud, unconscionable commercial practice, deception or false promises.

In its reply to the Defendants' motion, CECG argues that consumer fraud "is the very marketing tactic that has allowed Defendant Magic to prosper. In order to open the US market to this foreign software, and thereby create a user base in the United States, Magic sold its early version with oral promises, that it knew could not be enforced by the buyers." Pl. Br. at 18. The accusation that MSE perpetrated commercial fraud through inducing contracts through unenforceable promises was the subject of prior litigation between these parties. *See CECG, Inc. v. Magic Software Enterprises*, No. 95-800, slip. op. (D.N.J. Sept. 13, 1996). These allegations, however, are not the focus of the current litigation as CECG goes on to plainly assert that its Current claims are limited to the "new contract between the parties," Pl. Br. at 19.

Appendix B

Despite an array of allegations, CECG provides no evidence of deception that relate to the facts before this court. CECG's central complaint is that it has been unable to enforce the terms of its own Purchase Agreement that require MSE to provide an unlimited runtime license. There is no evidence that MSE offered to provide an unlimited runtime license before CECG introduced that obligation as a term of its Purchase Order. While MSE honors previously existing unlimited runtime licenses, it is clear that the company no longer provides this kind of license for new development engines in the United States. CECG seeks a product that MSE does not sell. This falls far short of the requisite deception required to make out a claim of consumer fraud.

In this case, no reasonable jury could find in favor of CECG on its consumer fraud claim. There is simply no evidence before the court that supports CECG's accusations of deception with regard to this contract. Therefore, the Defendants' motion for entry of summary judgment on the consumer fraud claim is granted. Accordingly,

IT IS on this 11th day of December 2001:

ORDERED that Defendants' motion for summary judgment is GRANTED;

ORDERED that Plaintiff's motion for reconsideration is DENIED; and

Appendix B

ORDERED that Plaintiffs motion for summary judgment is DENIED.

s/ Harold A. Ackerman
Harold A. Ackerman, U.S.D.J.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED FEBRUARY 16, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Harold A. Ackerman, U.S.D.J.
Civ. A. No. 00-2262 (HAA)

CECG, INC., a corporation of the State of New Jersey,

Plaintiff,

v.

MAGIC SOFTWARE ENTERPRISES, INC. and MAGIC SOFTWARE ENTERPRISES, LTD.,

Defendants.

ORIGINAL FILED
FEB 16, 2001

OPINION & ORDER

Harold A. Ackerman, U.S.D.J.

Plaintiff, CECG, Inc., moves to remand this case to the New Jersey Superior Court, Middlesex County, Chancery Division. For the following reasons, plaintiff's motion is denied.[1]

---

1. The Court did not hear argument, rather, it opted to adjudicate plaintiffs motion on the papers. See Fed. R. Civ. P. 78.

Appendix C

I. BACKGROUND

This is a dispute between software companies. Defendant, Magic Software Enterprises, Ltd. ("Magic Ltd."), is an Israeli corporation that produces a product known as Magic Software. (Cert. of Russell Taitz at ¶2.)[2]

Succinctly stated, Magic Software is a tool for writing other software. It consists of two components. The first is a "development engine" that enables programmers to create new software for their clients. Magic Ltd. has improved its development engine over time. Newer versions apparently offer features that earlier versions lack. The second component is a "runtime module," which allows the client — or "end user" — to operate the newly created software. (*Id.* at ¶¶ 3-7.) Magic Ltd. offers several types of runtime modules: at the low end, it sells modules that permit a single end user to run the new software from the desktop of a computer, while, at the high end, it offers modules that allow a large number of end users to operate the new software over the internet. (*Id.*) Magic Ltd. distributes Magic Software in the United States through its subsidiary, Magic Software Enterprises, Inc. ("Magic Inc."), a California corporation. (*Id.* at ¶ 2.)

CECG, a New Jersey corporation, is a computer programming firm. (Compl. at ¶1.) It uses Magic Software to create customized software for its clients. CECG began using Magic Ltd.'s products in 1988. At some point it purchased development engine 5.02C along with a compatible "unlimited" runtime

---

2. Taitz serves as the Vice President of Operations for Magic Software Enterprises, Inc. (Taitz Cert. at T 1.)

module. (Cent. of Mitch Geier at ¶¶ 2-6.)[3] That module enabled an unlimited number of end users to run the software that CECG created using version 5.02C.[4]

Toward the end of 1999 CECG decided to improve its infrastructure by upgrading its development engine. Although version 5.02C was not yet obsolete, CECG desired to convert to version 8.x to take advantage of that program's new features and capabilities. (*Id.* at 3-4.) Rather than order the program by phone, CECG drafted its own purchase order ("the Purchase Order") and forwarded it to Magic Inc. (Id. 7.) In addition to specifying the product, quantity, and price that CECG wanted, the Purchase Order contained a number of supplementary terms and conditions. Paragraph 4 allegedly obligated Magic Inc. to provide, without charge, an unlimited runtime module for use with version 8.x and all subsequent versions of the development engine.[5] In addition, paragraph 8

---

3. Geier is CECG's President. (Geier Cert. at ¶ 1.)

4. Magic Ltd. ceased offering unlimited runtime modules in the United States in 1992. (Taitz Cert. ¶ 8.)

5. The Purchase Order actually required Magic Inc. to make CECG's old runtime module compatible with version 8.x and later versions of the development engine. It specifically stated:

> This order shall reinstate the buyers [sic] understanding of the unlimited run time [sic] license. The seller shall update and upgrade the unlimited runtime license currently called deployment [sic] without charge to the buyer whenever the buyer upgrades or updates the development tools or program generator to any version

(Cont'd)

selected Middlesex County, New Jersey as the venue for resolving prospective contractual disputes.

Magic Inc. received the Purchase Order, retained CECG's payment, and shipped the disks needed to install version 8.x. Along with the disks, Magic Inc. forwarded a copy of its standard license agreement ("the License Agreement"), which advised purchasers to:

> Carefully read all the terms and conditions of this Product License Agreement prior to opening this package. If you do not agree to these terms and conditions, please return the unopened disk package and the components of this Product to the place of purchase and your money will be refunded. No refunds will be given for Products with an opened disk package or missing component(s). Only if you accept each of the terms below should you open this package and use the enclosed Product.

(Taitz Cert. at Ex. B, "MAGIC LICENSE AGREEMENT FOR NORTH AMERICA ONLY.") The License Agreement also contained a forum provision, which recited that "any action or suit brought to enforce any right or remedy of this Agreement shall be subject to the exclusive jurisdiction and

---

(Cont'd)

> or renamed product so that the licensed versions and names shall match shall match [sic]. This reinstatement is irrevocable.

(Purchase Order at ¶ 4.)

venue of the California State or Federal Courts sitting in Orange County, California." (*Id.* at Ex. B, "GOVERNING LAW AND FORUM SELECTION.") Magic Inc. shipped the disks and License Agreement in a single package.

Before it received this package, CECG contacted Magic Inc. CECG explained that it was already running an older version of the development engine and, thus, that it did not need to install entirely new software. Rather, CECG merely needed a set of codes to convert version 5.02C to version 8.x. Magic Inc. provided the codes by fax, enabling CECG to make the conversion. (Geier Cert. at ¶¶ 11-13.)

Shortly after it completed this conversion, CECG learned that its old runtime module was not compatible with its new development engine. (Compl. at ¶¶ 12-13.) Although CECG could create new software using version 8.x, its clients could not operate those programs. (*Id.* at 22.) According to CECG, paragraph 4 of the Purchase Order obligated Magic Inc. to remedy this compatibility problem without charge. When Magic Inc. refused, CECG brought suit.

II. PROCEDURAL HISTORY

CECG commenced this action on April 17, 2000 in the New Jersey Superior Court, Middlesex County, Chancery Division. The Complaint set forth causes of action for breach of contract and consumer fraud and sought equitable relief as well as damages.

Defendants removed the action to this Court on May 10, 2000 on the basis of diversity between the parties. CECG

moved for remand. In CECG's view, remand is appropriate for two reasons. The first is statutory. CECG claims that its damages fall below the threshold for diversity actions and, hence, that this Court lacks jurisdiction over this dispute.

CECG also advances a contractual argument. It reasons that, even if this Court possesses jurisdiction, the Purchase Order provides for exclusive venue in Middlesex County. Neither argument is persuasive.

III. DISCUSSION

A. CECG's Statutory Argument

Actions that are within the federal courts' original jurisdiction are generally removable from state court. *See* 28 U.S.C. § 1441. The removing party shoulders the burden or demonstrating that removal is proper. *State of New Jersey v. City of Wildwood*, 22 F.Supp.2d 395, 400 (D.N.J. 1998). Defendants posit that removal is warranted because this case is within the federal courts' diversity jurisdiction. Therefore, to resist CECG's remand motion, defendants must show that this case satisfies the dictates of 28 U.S.C. § 1332.

There is no dispute that complete diversity exists here. Nor could there be. CECG is a New Jersey corporation. Magic Ltd. is an Israeli entity; its principal place of business is located in Or Yehuda, Israel. (Taitz Cert. at ¶ 2; Ex. B.) Its distributor, Magic Inc., is a California corporation headquartered in Irvine, California. (Notice of Removal at ¶ 2.) Therefore, the requisite diversity exists between the parties. *See* 28 U.S.C. § 1332.

Appendix C

The real issue is whether this case meets the $75,000.00 amount-in-controversy requirement for diversity actions. *Id.* CECG maintains that it does not. In fact, CECG suggests that its damages are less than $50,000.00. It offers to cap its recovery at that amount if this case is remanded to state court. (Pl.'s Br. in Supp. of Motion to Remand at p. 2.) CECG's arguments are unconvincing.

To discern the amount in controversy, the Court must conduct an independent appraisal of CECG's claims. *See Penn v. Wal-Mart Stores, Inc.*, 116 F.Supp.2d 557, 561 (D.N.J. 2000). That appraisal begins with an analysis of the complaint, but may encompass additional evidence if necessary. *Id.* at 562. The goal is, ultimately, to arrive at a "reasonable reading of the value of the rights being litigated." *Angus v. Shiley*, 989 F.2d 142, 146 (3d Cir. 1993); *see also In re Corestates Trust Fee Litia.*, 39 F.3d 61, 65 (3d Cir. 1994) (opining that "in injunctive actions, it is settled that the amount in controversy is measured by the value of the right sought to be protected by the equitable relief").

The Complaint's first count, which accuses defendants of breach of contract, requests an equitable remedy: specific performance of the terms of the Purchase Order. Paragraph 4 of the Purchase Order allegedly requires defendants to provide an unlimited runtime module for use with version 8.x and all subsequent versions of the development engine. (Purchase Order at ¶ 4.) The Complaint seeks to compel defendants to supply these modules so that CECG can distribute its software over the internet to an unlimited client pool. (Compl. at ¶ 7.)

Defendants submit persuasive — and uncontradicted — evidence that this equitable relief is worth much more than $75,000.00. See *Becker v. Sherwin Williams*, 717 F.Supp. 288,295 (D.N.J. 1989) (noting that courts must value the equitable relief sought to determine whether the amount-in controversy requirement has been met). Magic Ltd. markets a number of runtime modules that allow end users to operate software from the internet. The most basic costs $1,400.00 per user; the most intricate, $70,000.00 per user. (Taitz. Cert. at ¶ 7.) Based on these figures, a runtime module that would enable an unlimited number of end users to run software from the internet could reasonably cost more than $75,000.00. *See Angus*, 989 F.2d at 146 (noting that "the amount in controversy is not measured by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated").[6] The right to receive unlimited runtime modules in perpetuity – for use with each successive version of Magic Ltd.'s development engine — could easily be worth well over $1 million. Therefore, this Court finds that CECG's equitable claims, standing alone, exceed the jurisdictional amount for diversity actions. See 28 U.S.C. § 1332.[7]

---

6. For example, a basic module that would allow 100 end users to operate software over the internet would cost $140,000.00. (Taitz Cert. at ¶ 6.) To accommodate the same number of end users, a more complex module might run as much as $7,000,000.00. (Id. at ¶ 7.)

7. CECG also seeks compensatory contract damages as well as punitive and treble damages for defendants' allegedly fraudulent conduct. These damages, coupled with the value of the equitable relief sought, easily satisfy the amount in controversy requirement. *See Angus*, 989 F.2d at 146.

Appendix C

In an effort to thwart diversity, CECG offers to cap its damages at $50,000.00. That offer is misguided. CECG cannot avoid diversity jurisdiction by stipulating that its damages are less than $75,000.00. *See Angus*, 989 F.2d at 145. Moreover, even if CECG's offer did have legal significance, diversity jurisdiction would still exist in this case. The Complaint seeks equitable relief in addition to damages. As noted, that reasonable value of that equitable relief far exceeds $75,000.00. Accordingly, this Court finds that diversity jurisdiction exists in this case despite CECG's offer to limit its recovery.

B. *CECG's Contractual Argument*

CECG also argues that remand is appropriate even if diversity jurisdiction exists. The Purchase Order contains a venue clause, which designates Middlesex County, New Jersey as the site for litigation. (Purchase Order at ¶ 8.) That provision allegedly binds the parties and necessitates remand to state court. CECG's argument presupposes that the Purchase Order's venue clause is a component of the parties' agreement. For the following reasons, it is not.

The parties agree that New Jersey's Uniform Commercial Code governs their dealings.[8] The U.C.C. rejects the "mirror

8. The U.C.C. applies to transactions in goods. N.J.S.A. 12A: 2-102. The sale at issue involves software — which CECG purchased to modify and resell — and qualifies as a transaction in goods. *See Conopco, Inc. v. McCreadie*, 826 F.Supp. 855, 869 (D.N.J. 1993), *aff'd*, 40 F.3d 1239 (3d Cir. 1994) (acknowledging that software may be considered a good within the meaning of the U.C.C.); *Triple Point*

(Cont'd)

image rule," which means that a contract may be formed even if the acceptance does not precisely match the offer. See N.J.S.A. 12A:2-207; *see also Northrop Corp. v. Litronic Industr.*, 29 F.3d 1173, 1174 (7th Cir. 1994). Under the U.C.C., "a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, **unless acceptance is expressly made conditional on assent to the additional or different terms.**" N.J.S.A. 12A:2-207(1) (emphasis supplied). The highlighted language of limitation allows the offeree to prevent contract formation by conditionally accepting the offer. A conditional accep-tance, which expressly requires the offeror to assent to the additional or different terms, is construed as a counteroffer. *See Reaction Moldings Technologies, Inc. v. General Electric Co.*, 588 F.Supp. 1280, 1288 (E.D. Pa. 1984).

Due to the policies underlying the U.C.C., courts are hesitant to find that a counteroffer has been made rather than an acceptance with proposed terms. *See id.* A counteroffer will be found "only where the offeree clearly reveals its unwillingness to proceed with the transaction unless it is assured of the offeror's assent to the different or additional

---

(Cont'd)

Technology, Inc. v. D.N.L. Risk Mgmt., Inc., No. CIV. A. 99-4888 (WHW), 2000 WL 1236227, at *6-7 (D.N.J. April 11, 2000) (distinguishing between transactions involving software, which are governed by the U.C.C., and those involving intellectual property, which are not); see also *CECG, Inc. v. Magic Software Enterprises, Inc.*, Civ. A. No. 95-800 (JCL) (D.N.J. filed Sept. 13, 1996) (applying the U.C.C. in a prior contractual dispute between CECG and defendants).

terms." *Id.*; *see also Air Master Sales Co. v. Northbridge Park Co-Op Inc.*, 748 F.Supp. 1110, 1116 (D.N.J. 1990) (finding that the offeree's response was a counteroffer and not an acceptance). In other words, the offeree must manifest an intent to forgo the transaction if the offeror does not agree to the additional or different terms. *See Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91, 102 (3d Cir. 1991).

In this case, the Purchase Order constituted an offer to buy defendants' product on very specific terms. In response, Magic Inc. shipped the product along with the License Agreement. CECG contends that, merely by sending the product and retaining payment, Magic Inc. accepted the Purchase Order's terms. That argument is untenable. Magic Inc. expressly conditioned the transaction on CECG's assent to the License Agreement's terms, which diverged markedly from the Purchase Order's terms.[9]

---

9. The following differences are illustrative: (1) the Purchase Order demanded an unlimited runtime module for use with version 8.x and all later versions of that program, (Purchase Order at ¶ 4), while the License Agreement offered a per-user runtime module for version 8.x only, (Taitz Cert. at Ex. B, "GENERAL COPYING RESTRICTIONS," ¶ a); (2) the Purchase Order contained a broad remedies clause, (Purchase Order at ¶ 7), whereas the License Agreement included a limited warranty that constrained the buyer's remedies, (Taitz Cert. at Ex. B, "LIMITED WARRANTY," ¶¶ c-e); (3) the Purchase Order required defendants to pay CECG's attorneys' fees and costs in the event of litigation, (Purchase Order at ¶ 10), while the License Agreement disclaimed such a provision, (Taitz Cert. at Ex. B, "ACKNOWLEDGMENT"); and (4) the Purchase Order chose New Jersey law and selected a New Jersey venue, (Purchase Order at ¶ 8), whereas the License Agreement opted for California

(Cont'd)

Appendix C

The License Agreement's language is unmistakable. It directed CECG to "carefully read all the terms and conditions of this Product License Agreement," and announced that "if you do not agree to these terms and conditions, please return the unopened disk package and the components of this Product to the place of purchase and your money will be refunded." (Taitz Cert. at Ex. B, "MAGIC LICENSE AGREEMENT FOR NORTH AMERICA ONLY.") By promising a refund, the License Agreement conveyed defendants' willingness to forgo the sale if CECG did not agree to the License Agreement's terms. *See Step-Saver*, 939 F.2d at 102 (intimating that a refund offer could amount to a conditional acceptance/counteroffer but finding that the facts of the case did not warrant that conclusion).

In addition to offering a refund, the License Agreement warned CECG not to open the package or use the enclosed software unless it accepted the License Agreement's terms. (Taitz Cert. at Ex. B., "MAGIC LICENSE AGREEMENT FOR NORTH AMERICA ONLY" (cautioning that "only if you accept each of the terms below should you open this package and use the enclosed Product").) By employing conditional language, the License Agreement communicated that defendants would not proceed with the transaction, nor recognize CECG's right to use the product, until CECG agreed to the License Agreement's terms. *See Air Master*, 748 F.Supp. at 1116-17.

(Cont'd)
law and a California venue, (Taitz Cert. at Ex. B, "GOVERNING LAW AND FORUM SELECTION"). Standing alone, these dramatic discrepancies create significant doubt that the License Agreement was meant as an acceptance of the Purchase Order.

These provisions make plain that the License Agreement offered defendants' product on a take-it-or-leave-it basis and expressly indicated that a contract would not arise unless CECG assented to the License Agreement's specific terms. *See* N.J.S.A. 12A:2-207(1); *Reaction Molding*, 588 F.Supp. at 1288. As such, the License Agreement was a counter-offer — not an acceptance with proposed terms — and did not transform the Purchase Order into a binding contract. *See Air Master*, 748 F.Supp. 1116-17; *see also Step-Saver*, 939 F.2d at 99 n. 19 (finding that courts must often resolve questions of contract formation under the U.C.C. as a matter of law). Therefore, the Purchase Order's venue clause provides no basis for remand.[10]

If a contract arose at all in this case, then it came about as a result of the parties' behavior rather than their writings. *See* N.J.S.A. 12A:2-207(3). Assuming that the parties' conduct did, in fact, give rise to a contract, the terms of that

---

10. Even if the License Agreement did constitute an acceptance, remand would still be unwarranted. Under the U.C.C., conflicting terms cancel each other out. See N.J.S.A. 12A:2-207, cmt. 6 (construing a different term in an acceptance as an objection to the corresponding term in the offer and stating that "the conflicting terms do not become part of the contract"); *see Northrop*, 29 F.3d 1178 (noting that "the majority view is that the discrepant terms fall out and are replaced by a suitable UCC gap-filler"); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579-80 (10th Cir. 1984) (distinguishing between additional terms, which may become part of the contract, and different terms, which knock each other out). Here, The License Agreement and the Purchase Order contain different venue terms. Those terms nullify each other. Thus, assuming that the License Agreement did accept the Purchase Order, the resultant contract would not have a venue clause.

agreement "consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provision of this Act." *Id.* As noted, the License Agreement and Purchase Order contain conflicting venue terms. Those provisions cancel out and would not become part of any contract arising under § 2207(3).[11]

IV. CONCLUSION & ORDER

For all of the foregoing reasons, the Court finds (1) that this case satisfies the requirement for diversity jurisdiction, and (2) that the Purchase Order's venue clause provides no basis for remand to state court. Therefore:

It is on this, 16th day of February 2001:

ORDERED that CECG's motion to remand to the Superior Court, Middlesex County, Chancery Division is DENIED.

s/ Harold A. Ackerman
Harold A. Ackerman, U.S.D.J.

---

11. CECG attempts to avoid this conclusion by arguing that it neither read nor assented to the License Agreement's terms. (Geier Cert. at ¶¶ 10-15.) In CECG's view, the Purchase Order was the last writing and, as a result, constituted the final expression of the parties' agreement. This reasoning is flawed. The U.C.C. rejects the "last shot rule." As a result, a party cannot unilaterally dictate the terms of a contract simply by sending the last written form. See *StepSaver*, 939 F.2d at 99. Thus, the Purchase Order is not binding merely because it was final.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED NOVEMBER 19, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1036

CECG, INC.,

Appellant

v.

MAGIC SOFTWARE ENTERPRISES, INC. and
MAGIC SOFTWARE ENTERPRISES, LTD.

On Appeal from the United States District Court
for the District of New Jersey
(Civil Action No. 00-CV-2262)
Before: BARRY, AMBRO, and GARTH, Circuit Judges

ORDER

The Petition for Panel Rehearing filed by Appellant, CECG, Inc., a corporation of the State of New Jersey, in the above-entitled matter, having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for panel rehearing, the Petition for Panel Rehearing is hereby DENIED.

Appendix D

BY THE COURT,

s/ [illegible]
United States Circuit Judge

DATED: 19 NOV 2002

APPENDIX E — RELEVANT PROVISIONS INVOLVED

RELEVANT PROVISIONS INVOLVED

7TH AMENDMENT TO US CONSTITUTION

AMENDMENT [VII]
Civil trials

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Appendix E

N.J.S.A. 12A:2-201

NEW JERSEY STATUTES ANNOTATED
TITLE 12A. COMMERCIAL TRANSACTIONS
SUBTITLE 1. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES
SUBCHAPTER 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT

12A:2-201. Formal requirements; statute of frauds

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable.

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (12A:2-606).

Appendix E

N.J.S.A. 12A:2-202

NEW JERSEY STATUTES ANNOTATED
TITLE 12A. COMMERCIAL TRANSACTIONS
SUBTITLE 1. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES
SUBCHAPTER 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT

12A:2-202. Final written expression: parol or extrinsic evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (12A:1-205) or by course of performance (12A:2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Appendix E

N.J.S.A. 12A:2-207

NEW JERSEY STATUTES ANNOTATED
TITLE 12A. COMMERCIAL TRANSACTIONS
SUBTITLE 1. UNIFORM COMMERCIAL CODE
CHAPTER 2. SALES
SUBCHAPTER 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT

12A:2-207. Additional terms in acceptance or confirmation

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a

reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Supreme Court, U.S.
FILED
MAR 21 2003
CLERK

No. 02-1219

In the

Supreme Court of the United States

CECG, INC.,

Petitioner,

v.

MAGIC SOFTWARE ENTERPRISES, INC. and
MAGIC SOFTWARE ENTERPRISES, LTD.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Lindsey H. Taylor, Esq.
Counsel of Record
CARELLA, BYRNE, BAIN, GILFILLAN, CECCHI, STEWART & OLSTEIN
6 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Respondents

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

22 pp

QUESTION PRESENTED

Does Section 2-207 of the Uniform Commercial Code "knock out" conflicting provisions in form agreements exchanged between a buyer and a seller of goods?

LIST OF PARTIES TO THE PROCEEDING

In accordance with Rule 29.6, Magic Software Enterprises, Inc. is a wholly owned subsidiary of Magic Software Enterprises, Ltd., which is publicly traded.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

BASIS FOR SUPREME COURT JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

CECG'S PETITION FOR CERTIORARI SHOULD BE DENIED 10

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

DAITOM, INC. v. PENNWALT CORP., 741 F.2D 1569, 1579 (10TH CIR. 1984) 13

NORTHROP CORP. v. LITRONIC INDUSTRIES, 29 F.3D 1173, 1178-1179 (7TH CIR. 1994) 13

OLEFINS TRADING, INC. v. HAN YANG CHEM CORP., 9 F.3D 282, 288 (3D CIR. 1993) 12

RICHARDSON v. UNION CARBIDE, 347 N.J.SUPER. 524, 533 (APP. DIV. 2002) 12, 13

STEP-SAVER DATA SYSTEMS, INC. v. WYSE TECHNOLOGY, 939 F.2D 91, 99 (3D CIR. 1991) 14

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332(A) 8

28 U.S.C. §1441 8

N.J.S.A. 2A:2-207 12

UCC § 2-207 ..... *passim*

UCC § 2-207(2)(A) 15

UCC § 2-207(2)(B) 15

UCC § 2-207(2)(c) 15

BASIS FOR SUPREME COURT JURISDICTION

The Judgement and mandate of the United States Court of Appeals for the Third Circuit was issued on November 27, 2002. The basis for jurisdiction in this Court is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Uniform Commercial Code Section 2-207 provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

STATEMENT OF THE CASE

Plaintiff CECG, Inc. is a computer consulting firm which sells and creates computer software, among other products. Magic is computer software which creates other software. It was developed by defendant Magic Software Enterprises, Ltd., an Israeli corporation. It is sold in the United States by its wholly owned subsidiary, Magic Software Enterprises, Inc.[1] Magic is sold in two components which are purchased separately, a "development engine", which works to create the software which the developer is writing, and a "run time" or deployment module, which allows the created software to operate on a computer without being able to be modified by the user. (Pet. App. B, 16a to 17a)

CECG first purchased Magic version 2.5 in 1988. The initial price for the development engine software was $199. At that time, Magic was offered with offered two versions of the runtime module. The per-user runtime could be purchased for approximately $59, but used for only one end user, and an unlimited runtime which cost $699, but could be used for an unlimited number of end users. CECG claims that when it initially purchased Magic, the alesman promised that, in the future, whenever he purchased an upgrade of its development engine software, it would receive a free unlimited runtime upgrade, essentially a "buy one, get one free" offer. It was CECG's belief that the original offer to include a free unlimited runtime upgrade with an upgrade of the development engine entitled it to free unlimited runtime upgrades in perpetuity. (Pet. App. B, 17a)

---

[1] The two Magic Software Enterprises entities are referred to as "MSE". For purposes of this petition, it is not necessary to distinguish between the two.

In June 1993, MSE discontinued offering the unlimited runtime product, and only offered a single-user runtime. As a result of this and other perceived wrongs by MSE, CECG filed suit, alleging a multitude of theories. That action was dismissed on summary judgment, primarily because the alleged promise of "buy one, get one free" software was not in writing and, thus barred by the statute of frauds. (Pet. App. B, 17a to 18a)

The parties had no further contact until September 1999. At that time, CECG had a client who needed an update to a Magic-based product CECG had written for it in the early 1990s. Mitch Geier, CECG's owner, contacted MSE and spoke with a salesperson, Kelly Urschel. Ms. Urschel faxed to Mr. Geier a number of items, which included a description of MSE's current products, a price list, and copy of MSE's standard software license agreement. An unlimited runtime license was not among the products offered for sale. MSE's form license agreement provided, *inter alia*:

> a. Use the Product as licensed with respect to the number of users. The Product is packaged in a manner to provide a specific number of users per package. If several persons use this Product at the same time or if one person uses it on more than one computer, you must pay one license fee for each copy being used. This includes use on a computer network. You must pay a license fee for the number of users specified in the Product package. You may not use the Product for more than the specified number of users. In case you have any questions regarding the number

> of users permitted you should immediately contact MSE.

(Pet. App. B, 18a). MSE's form license agreement also provided:

> If you do not agree to these terms and conditions, please return the unopened disk package and the components of this Product to the place of purchase and your money will be refunded. . . . Only if you accept each of these terms below should you open this package and use the enclosed Product.

(Pet. App. B, 18a). MSE's form license agreement further had a venue provision, that the exclusive venue for any dispute would be in the state or federal courts in Orange County, California. *(Id.)*

After reviewing these documents, Mr. Geier asked Ms. Urschel to send him a demonstration copy of the software. Along with the demonstration copy of the software, Mr. Geier also received codes which allowed him to use the software on the CD on a free trial basis. Those codes allowed the software to run through December 31, 1999. (Pet. App. B, 19a)

In early January 2000, Mr. Geier decided to purchase one of MSE's products. He again contacted Ms. Urschel about the purchase, and Ms. Urschel sent him another price list. An unlimited runtime license was not among the items on the price list. When he placed the order, Ms. Urschel asked Mr. Geier for a credit card, but he refused. According to Mr. Geier, he told Ms. Urschel that he wanted to send a check along with a purchase order, and that the purchase had to be subject to his terms and conditions. Thereafter, Mr. Geier sent a

Purchase Order dated January 10, 2000 to MSE for one copy of its Development Universal Client Server for $3,600, plus one year of technical support for $880. Along with the purchase order, he enclosed a check for $4,480.00 for this software. The back of the purchase order contained a number of terms, including the following:

> This order shall also reinstate the buyers [sic] understanding of the unlimited runtime license. The seller shall update and upgrade the unlimited runtime license currently called deployment without charge to buyer whenever the buyer upgrades or updates the development tools or program generator to any version or renamed products so that the licensed versions and names shall match shall match [sic]. This reinstatement shall be irrevocable. Further the seller agrees to continue selling the development tools and support/support agreements to the buyer at the current going rate or a discounted rate that is applicable. This supersedes all past and future shrink-wrap licensing agreements. The buyer shall not be required to disclose its [sic] and the seller shall not seek to deal directly with a client of the buyer.

(Pet. App. B, 20a to 21a) CECG's form contract contained a provision which provided for the venue of any disputes to be in New Jersey Superior Court in Middlesex County. (*Id.*).

Ms. Urschel shipped an additional copy of the software CD, along with an additional copy of MSE's

form license agreement to Mr. Geier, but Mr. Geier pointed out to her that all he needed was the key to reactivate the demo software which he already had on his computer. Ms. Urschell then faxed to Mr. Geier the Product Authorization Key to allow the development software which CECG had purchased to operate for an unlimited time. The Product Authorization Key provides that "The PAK is an integral part of the licensed software product identified on the front of this document ("The Software") and is provided subject to the license terms applicable to the software." (Pet. App. B, 21a)

In March 2000, Mr. Geier again contacted MSE, now demanding his free unlimited runtime license. Mr. Geier wrote to Ms. Urschel demanding the unlimited runtime license. Mr. Geier was referred to Tammy Meyer, the East Coast account representative. Ms. Meyer spoke with Russell Taitz, Vice-President of Operations for MSE. This was Mr. Taitz' first hearing of CECG's claimed entitlement to a free unlimited runtime license. He and Ms. Meyer called Mr. Geier in response to his demand for the unlimited runtime license. Mr. Taitz offered to return CECG's money, but declined to provide Mr. Geier a free unlimited runtime license. (Pet. App. B, 22a; (Pet. App. A, 7a)

Immediately thereafter, this action was filed in the Superior Court of New Jersey, Chancery Division, Middlesex County, on April 12, 2000 along with an Order to Show Cause seeking a preliminary injunction obligating MSE. to provide free software to CECG. In its Complaint, CECG sought specific performance of the terms contained on the back of its Purchase Order which purported to require MSE to provide a free upgrade for its unlimited runtime software, and to eliminate "time bombs" which allegedly were contained

in the software CECG had purchased from MSE. CECG further alleged that MSE's failure to honor the foregoing provision also constituted a violation of the New Jersey Consumer Fraud Act.

MSE removed the action to the United States District Court for the District of New Jersey on May 10, 2000 pursuant to 28 U.S.C. §1441, based upon diversity jurisdiction, since the amount in controversy exceeded $75,000 and CECG is a New Jersey corporation, while Magic Software Enterprises, Inc. is a California corporation and Magic Software Enterprises, Ltd. is an Israeli corporation.

Thereafter, CECG moved to remand the case back to the Superior Court. It offered to stipulate that its money damages would not exceed $50,000 and sought to enforce an exclusive venue provision contained in the purchase order for the software in issue. The District Court denied the motion to remand. (Pet. App. C, 41a to 54a). Although CECG had offered to stipulate that its damages would not exceed $50,000, the District Court held that the amount in controversy requirement of 28 U.S.C. § 1332(a) was satisfied because of the value of the software which CECG sought to receive by way of a mandatory injunction. The District Court further held that the venue provision contained in CECG's purchase order was "knocked out" by a contrary venue provision contained in MSE's license agreement. In the absence of a venue provision in the contract between the parties, venue was appropriate in the District Court. (*Id.*)

The parties then proceeded with discovery. After the close of discovery, the parties filed cross-motions for summary judgment. In addition, CECG filed a Motion for Consideration (sic) pursuant to New Jersey L.Civ.R.

7.1(g) requesting that the District Court change its decision denying CECG's motion for remand, based upon facts developed during discovery. MSE's motion for summary judgment was granted and CECG's claims were dismissed. CECG's motion for reconsideration of the District Court's denial of its motion for remand was denied because it was untimely and because it did not contain matters which the Court had "overlooked", as required by New Jersey L.Civ.R. 7.1(g), as it was based upon discovery taken after the remand motion had been decided. (Pet. App., 15a to 40a).

CECG thereafter timely filed an appeal. The United States Court of Appeals for the Third Circuit affirmed the decisions and judgment of the District Court, for substantially the same reasons relied upon by the District Court. (Pet. App. A, 1a to 14a). CECG filed a petition for rehearing, which was denied by way of Order dated November 19, 2002. (Pet. App. D, 55a to 56a). MSE's motion for damages pursuant to F.R.App.P. 38 was denied by way of Order dated November 20, 2002. The Judgement and mandate of the Court of Appeals was issued on November 27, 2002.

CECG'S PETITION FOR CERTIORARI SHOULD BE DENIED

CECG raises a number of issues here, all of which revolve around the application of UCC Section 2-207 to the particular form agreements exchanged between the parties. None of the considerations set forth in Sup.Ct.R. 10 are applicable to this case.

Sup.Ct.R. 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeal on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Here, none of those considerations apply. Indeed, no issues of federal law are presented, important or otherwise The issues in the instant case are governed by the Uniform Commercial Code, which is state contract law. CECG is attempting to manufacture federal questions because it is dissatisfied with the decisions of the Court of Appeals and the District Court. For example, its contention that it was denied its Seventh Amendment right to a jury trial because summary judgment was granted below is wholly frivolous. *See* WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2714 (discussing decisions upholding 7th Amendment challenges to summary judgment). By CECG's own admission, the errors it claims were made below are either erroneous factual findings or the misapplication of a properly stated rule of law to the peculiar facts of this case.

The issues here are governed by Section 2-207 of the Uniform Commercial Code. At common law, there could be no meeting of the minds, and thus no contract, unless the parties agreed on all terms of the contract. *E.g., Richardson v. Union Carbide*, 347 N.J.Super. 524,

533 (App. Div. 2002). Article 2 of the Uniform Commercial Code was designed to jettison the "mirror image rule" to recognize the existence of a contract even though certain terms remained in conflict or unresolved. *Id.* "N.J.S.A. 2A:2-207 was enacted to reform the common law mirror-image rule and reject the last-shot doctrine[2] which accorded undue advantage to the mere order in which forms were sent." *Id.* at 534.

Section 2-207 of the UCC determines which, if any, conflicting terms in the parties' respective forms become part of the contract. "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the bargain, they will not be included unless expressly agreed to by the other party." UCC § 2-207, Comment 3. A clause which would "materially alter" the contract is one which would result in "surprise or hardship if incorporated without express awareness by the other party." *Id.* Comment 4. "One of the main purposes of UCC § 2-207 is to facilitate oral contracts that are usually negotiated over the telephone and only later reduced to a writing. In particular, UCC § 2-207 is designed to serve as a way of dealing with conflicting or additional terms that were never a part of the bargaining process." *Olefins Trading, Inc. v. Han Yang Chem Corp.*, 9 F.3d 282, 288 (3d Cir. 1993). "In other words, terms governed by UCC § 2-207 are those terms that were never expressly agreed upon; rather they appear only later as non-negotiated terms in confirmatory memoranda or other types of business

---

[2] The "last shot rule" essentially provided that the terms of the last document exchanged between the parties governed the transaction. *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 99 (3d Cir. 1991).

forms purporting to 'confirm' what was previously discussed orally". *Id.*

When terms in the two parties forms contradict each other, there is a "mutual knockout" of the conflicting terms and, to the extent necessary, the missing terms are provided by gap fillers in the UCC. *E.g., Richardson, supra.; Northrop Corp. v. Litronic Industries*, 29 F.3d 1173, 1178-1179 (7th Cir. 1994); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir. 1984)(discussing authorities). When clauses on the parties' respective forms conflict, each party is deemed to object to the contrary term in the other's form and, as a result, the contrary terms do not become part of the contract. UCC § 2-207, Comment 6.

> The UCC, in § 2-207, rejected [the last shot rule]. Instead, it recognized that, while a party may desire the terms detailed in its form if a dispute, in fact, arises, most parties do not expect a dispute to arise when they first enter into a contract. As a result, most parties will proceed with the transaction even if they know that the terms of their form would not be enforced. The insight behind the rejection of the last shot rule is that it would be unfair to bind the buyer of goods to the standard terms of the seller, when neither party cared sufficiently to establish expressly the terms of their agreement, simply because the seller sent the last form. Thus, UCC § 2-207 establishes a legal rule that proceeding with a contract is not sufficient to establish the party's consent to the terms of the writing to the extent that the terms of the writing either

> add to, or differ from, the terms detailed in the parties' earlier writings or discussions. In the absence of a party's express assent to the additional or different terms of the writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed, along with any terms implied by the provisions of the UCC.

Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91, 99 (3d Cir. 1991).

The issues raised here by CECG presuppose that the terms of its Purchase Order govern the transaction between it and MSE, rather than addressing the issues argued and decided below: whether the terms of CECG's Purchase Order in fact became part of the bargain between parties by virtue of the operation of UCC § 2-207.

First, CECG contends that the federal courts had no jurisdiction over its claims against MSE because of the venue provision in its Purchase Order. It ignores the fact that MSE's form agreement had a contrary venue provision. By operation of § 2-207, those contrary provisions are "knocked out". Thus, there is *no* venue provision governing the transaction. The courts below correctly came to the same conclusion and found that the case was properly in the federal courts.

CECG argues that the Court of Appeals erroneously made new findings of fact with respect to the terms of its Purchase Order. Even assuming this were true, this is not a basis for granting certiorari. At worst, the Court of Appeals misread the terms of the Purchase Order. This does not give rise to any

important federal statutory or constitutional issues. It is simply claimed erroneous factual findings or the misapplication of a properly stated rule of law in this particular case.

However, the Court of Appeals' decision was correct in any event. The Court of Appeals did not make a factual finding that CECG's Purchase Order said something that it didn't, or didn't say something that it did. The Court of Appeals accurately quoted the terms of the Purchase Order. (*Compare* Pet. 19 *with* Pet. App. A, 6a, n. 4). The claimed error is whether the language of the Purchase Order "expressly limits acceptance to the terms of the offer" for purposes of UCC § 2-207(2)(a). That is a *legal* finding, not a *factual* finding. While CECG's Purchase Order contained language that its terms superceded any contrary language, the Court of Appeals found it did not *expressly* condition acceptance upon the terms of the offer. Moreover, even if it had expressly conditioned acceptance upon the terms contained in it, the provision regarding receipt of free runtime software in perpetuity "materially alter[ed]" the terms of MSE's writings because it changed the quantity term. By operation of UCC § 2-207(2)(b), CECG's attempt to receive free runtime software in perpetuity does not become part of the contract between the parties. Further, MSE's own form license and confirmatory invoices contained contrary terms, which, by the operation of UCC § 2-207(2)(c), act as an objection to the provision on the back of CECG's Purchase Order entitling it to free runtime software in perpetuity. Thus, in no event does that term become part of the agreement. It is "knocked out" by contrary terms in MSE's forms.

Clearly, issues raised herein are governed by contract law and the Uniform Commercial Code, not by

important federal questions. There is no conflict among the Circuits, or among state courts of last resort, with respect to an important question of federal law, nor does this case raise an important question of federal law which has not been, but should be settled by this Court. Rather, the purported errors identified by CECG are simply erroneous factual findings, or the misapplication of a properly stated rule of state law, which, in fact, are correct. There is no reason for the Court to grant CECG's petition for certiorari. In short, its petition is frivolous. Therefore, MSE respectfully requests that CECG's petition be denied and that it be awarded damages in accordance with Sup.Ct.R. 42.

CONCLUSION

For the reasons set forth herein, CECG's petition for certiorari is frivolous and should be denied.

Lindsey H. Taylor, Esq.
Counsel of Record
CARELLA, BYRNE, BAIN,
GILFILLAN, CECCHI,
STEWART & OLSTEIN
6 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Respondent